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EXAMINATION PACK

LCP4801 – INTERNATIONAL LAW

PAST PAPER SOLUTIONS

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QUESTION 1

International law is the law that governs relations between states. It is also the law that governs relations between states and international organisations as well as, between international organisations.

EVOLUTION OF INTERNATIONAL LAW AND WIDELY PERVASIVE EUROCENTRIC APPROACH

The evolution of international law has been claimed to be owed to the Western legal players. It is because of this belief that the historical evolution of international law is an integral part of the phenomenon of state formation. This process owed its influence to the conditions that started to prevail towards the end of the 1500s in parts of Europe and which account for what is usually referred to as the Eurocentric nature of 'early' international law.

The appearance of international relations thus coincided with the rise of several sovereign states as they entered into external relations with one another or when they sought the formation of alliances between themselves for the protection of their own or collective interests.

The period from 1500 to 1648

This period is known for the emergence of modern Europe and was characterised by vigorous economic expansion, followed by social, political and cultural transformations. After two centuries of decline, most areas in Europe now experienced an expansion in population growth with commercial activities becoming stronger and more closeknit within Europe. Geographic discoveries and expansion helped integrate Europe into a kind of world economic system.

This period saw the emergence of Westphalian model. This is an international order consisting mainly or exclusively of independent sovereign States which exercised untrammeled authority within their respective territories and freely coordinated their

mutual relations in accordance with their perceived self-interest on the basis of equality. It is a model which upholds state sovereignty and its major role in being a role player in international law. The sovereign equality of states and respect for their independence, ideas that developed between this period are still part of the fundamental principles of international law, and are enshrined in the UN Charter.

The period from 1648 to 1815

This event, described as the 'most important event in modern history', called into being a new form of state referred to as the nation state. It was based on a set of rules that were entirely different from those applicable in the colonial motherland at the time that the colonial émigrés started to settle in the new world. What emerged here was the concept of the nation as a political entity that was a voluntary association of a people under a common set of laws and represented by the same government. Connected to this historical notion of state formation were the aspirations of peoples or nations to independent statehood in the political and legal sense of the word. This led to the often interchangeable use of concepts such as 'nation' and 'state' in international law and in international relations.

The developments in this section provided the foundation for the establishment of a new international order based on a European balance of power. International law became the preserve of the European Christian states. Therefore, by the end of this epoch the new international order reflected European values. Access to this order by foreign states and overseas possessions was possible only with the consent of the Western powers and on conditions determined by them.

The nineteenth century was also the age of the European conferences between the major powers. These contributed significantly to the development of rules governing the waging of war and the settlement of disputes. Through a network of international relations, the application of international law principles expanded and necessitated the academic study of state practice at institutions of higher learning.

The period from 1815 to 1914

This is the period which saw the emergence of colonialism when African states were regarded as *terra nullius*. Colonial acquisitions were that while the presence of an indigenous population in these territories could prevent or limit the acquisition of private law rights, it could not prevent occupation of the territory for the purpose of asserting state sovereignty rights. Hence, any inhabited territory that was not the sovereign territory of a state, or a protectorate of a state, could become the object of occupation.

According to this theory, subjects of international law were only those states that exercised all rights of sovereignty and performed state functions in the same way as modern European states did. In Africa, although there were more or less distinct forms of political organisation, these were not sufficient to make it possible to speak of a real state. Therefore, they were not subjects of international law and their territory was ownerless in international law. Any recognised subject of international law could occupy Africa as *terra nullius*.

Before World Wars

Before the outbreak of World War I the Hague International Peace Conferences of 1899 and 1907 played a great role in developing international law. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict. The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns, but had no mitigating effect on Britain's scorched earth policy and the use of concentration camps in its war against the Boer Republics in South Africa (1899–1902). Nor could it prevent the outbreak of World War I.

Post-World Wars 1 and 2

During World War I the peaceful settlement of disputes received considerable attention in articles 12, 13 and 15 of the League of Nations, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the

Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.

The rise of international organisations

The establishment and proliferation of international organisations is generally attributed to the changing nature of international society, which has seen a marked increase in the degree of interactions between states, as well as the complexity of issues involved. In such circumstances, the traditional bilateral and ad hoc relations between states are said to have become outmoded, presenting a need to devise new forms and institutions of organisation. These developments form part of a progressive narrative charting the ongoing transformation of international law itself, from a law of coexistence to co-operation (and perhaps, community).

These periods refer to European scholars, European states and ideas as the foundation of the theories and practice of international law, including ideas such as state sovereignty, states as subject of international law, diplomatic immunity, and international organisations.

Key contributions by Africa to the development

Despite the unwritten nature of law in Africa, and of many of the historical sources, there is abundant evidence of formal relations at the highest governmental levels between the different peoples of West Africa in the pre-colonial period, and there is even some evidence of the existence of an inter-states system.[1]

The diplomatic interactions between African Kingdoms and European powers was mainly regulated by the principles of African customary law. For example, oaths and medicines were taken by parties in order to ensure the sanctity of contracts and treaties. The diplomatic immunity of accorded to representatives were based on customary rules

[1] Smith R "Peace and Palaver International relations in pre-colonial West Africa" 1971 *Journal of African History* 599–621.

of respect, care and hospitality. The Kingdoms of Benin and Kongo, exchanged ambassadors with Portugal.

Furthermore, slavery and colonialism contributed significantly to the relegation of African contribution to international law. Many of the principles that today guide diplomatic interaction, issues such as diplomatic immunity etc. were also applied during this period, such as the appointment of ambassadors, diplomatic immunity, the principle of sovereignty and territorial sovereignty, and principles of trade. Diplomats were appointed from the rank of nobles, and even slaves in some cases. These diplomats carried credentials such as fan, staff, cane or wore special clothing to signify their rank. There were breaches of diplomatic rules in some cases.[2]

In large areas of Africa there had emerged broadly similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law, this customary law shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty.[3] Thus it seems that customary law in unity in diversity, provided a bond between the different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.[4]

The similarities of the West African to the West European system, especially as the latter was before the emergence of the nation state and of permanent diplomacy about the time of the Renaissance, are striking. Ambassadors were despatched to represent their sovereigns abroad; their work, although it had its hazards, was within the protection of the law; treaties were concluded and solemn sanctions provided to uphold them since, in Africa as in Europe, 'treaties are made to be kept'.[5]

Conclusion

2 Smith 1971 *Journal of African History* 599–621.
3 Elias T “Africa and the development of international law” 1972.
4 Smith 1971 *Journal of African History* 599–621.
5 Smith 1971 *Journal of African History* 599–621.

It is not true that international law originates from Europe, because many pre-colonial African empires practiced international law in one form or the other.

QUESTION 2

a) Immunity in the context of international law

Immunity is the principle under international law which will prohibit a state from exercising jurisdiction over a matter that would ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved (for example, a head of state) or the nature of the conduct in question.

b) Various forms of immunity that can be enjoyed by various office bearers in international law

There are two forms of immunity, namely, personal and functional immunity.

i. Personal immunity

This form of immunity provides complete immunity of the person of certain officeholders while they carry out important representative functions'. It is absolute, covering both private and public acts committed by officials, even those committed prior to their taking office, but temporary, that is, it only applies in so far as the person holds the office in question. This form of immunity is provided for under both customary international law, as well as various treaties.

In the *Arrest Warrant*[6] it was held that these immunities also extend to certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.

ii. Functional immunity

This form of immunity relates to conduct carried out on behalf of a State. It is based on the notion that a state may not sit in judgment on the policies and

[6] Arrest Warrant of 11 April 2000 *(Democratic Republic of the Congo v Belgium*) (Judgment) ICJ Reports 2002.

actions of another state, since they are both sovereign and equal. Equally, when a person acts on behalf of a state, whether or not they are officials of that state, they may be able to rely on this form of immunity in respect of any criminal sanctions that would otherwise apply. However, in practice, functional immunity is more commonly raised in civil cases.

Different from personal immunity, functional immunity does not attach to all conduct performed by state officials, it only applies to conduct carried out within the official capacity, therefore, not absolute. It is also permanent and does not lapse when the official ceases to hold office because it is the conduct itself and not the office bearer that forms the basis of that immunity.

iii. Diplomatic immunity

In terms of section 3(1) of the DIPA, the Vienna Convention on Diplomatic Relations 1961 applies to all diplomatic missions and members of such missions in the Republic. The reason for this immunity is because of the functions which are performed by the diplomats (diplomats represent their state, protect the interests of their nationals, conduct negotiations between their government and the government of the host state, report on conditions in the host state and promote friendly relations). It could also, in certain circumstances, be difficult for the embassy to fulfil its protective function without immunity. The reason behind diplomatic immunity is therefore to enable the mission to perform its functions.

iv. Consular immunity

In terms of section 3(2) of the DIPA, the Vienna Convention on Consular Relations 1963 applies to all consular posts and members of such posts in the Republic.

The reasoning behind consular immunity is the same as that behind diplomatic immunity. However, because a consulate has less status than an embassy, the extent of its immunity is reduced accordingly.

c) <u>The court approached the claims by the Minister of International Relations that Grace Mugabe enjoyed immunity</u>

The Minister in the current case gave immunity to Grace under section 7(2) of Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA). This section states that the Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette.[7] The issues before the court were as follows:[8]

1. Did Mugabe enjoy immunity for the alleged unlawful act perpetrated against Engels by virtue of being a spouse of a head of state?
2. If not, was the decision of the Minister to confer or grant immunity to Mugabe constitutional and lawful?

The court held that customary international law is a recognised well established practice that states adhere to in their dealings with each other.[9] For customary law to be applicable it has to meet both requirements usus and opinio juris not only one. Usus was met but whether opinio juris was met was a question of fact as well a question of law. The court held that immunity is not for personal gain of the official but it exists to ensure that states function effectively and that there is a well ordered workable system of international relations where peace and harmony can exist between states.[10]

The court quoted *Arrest Warrant* case in that the functions of Minister Foreign Affairs (this applies to the head of state as well as the head of government) are such that throughout the duration of his/her office he/she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity that inviolability protects the

7 Diplomatic Immunities and Privileges Act 37 of 2001.
8 *Democratic Alliance v Minister of International Relations and Co-operatio*n Case No 58755/17.
9 Article 38(1)(b) of the Vienna Convention on the Law of Treaties.
10 *Democratic Alliance v Minister of International Relations and Co-operation* [17].

individual concerned against any act of authority of another state which would hinder him/her in the performance of his/her duties.[11]

In answering whether personal immunity applies to the spouse of the head of state, the court held that in a South African context personal immunity will be granted where:

i. A customary norm that is consonant with the prescripts of the Constitution;
ii. The prescripts of an international treaty which is constitutionally compliant; and
iii. National legislation which is constitutionally compliant.

The decision that does not fall within one of the above categories will not withstand the test of legality, reasonableness and rationality.

The court further held that the customary international law provides the contextual background of Foreign States Immunities Act 87 of 1981 (FSI). The object of FSI is to determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic and to give effect and some meaning to international customary law. The FSI continues to state that a foreign state shall be immune from the jurisdiction the courts of the Republic except as provided in this Act or in any proclamation issued thereunder which is then qualified with exceptions. One exception is found in section 6(a) that a foreign state shall not be immune from jurisdiction of the courts of the Republic in proceedings relating to the death or injury of a person (which is what Grace Mugabe was charged with).

In terms of this section 6(a) the former President Mugabe would not have enjoyed immunity because such personal immunity has officially been withdrawn by the current section. South African law has parted company with the customary international law and section 232 of the Constitution allows this. Thus even if the Minister was corrected in

[11] *Democratic Alliance v Minister of International Relations and Co-operation* [18].

her analysis that customary international law accorded immunity to Dr. Mugabe, her conclusion that this immunity has been extended was to our law was unlawful.[12]

The court further held that by recognizing the personal immunity the Minister committed an error of law. An error which was fundamental and fatal. It held that such immunity had to be set aside. The court contended that the Minister had the authority to grant the immunity in terms of section 7(2) of DIPA, however, this authority has to be exercised in a manner that is constitutional and lawful.[13] The final decision was therefore, that Grace Mugabe was not immune from jurisdiction.

QUESTION 3

a) Reservations

The international law remedy that is available for the Minister to ensure that signing the above international instruments does not conflict with Dondon's Sharia law is a reservation to a treaty. Article 2(1)(d) of the VCLT defines reservations as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

b) Lawful reservations

Reservations are guided by Article 19 of the VCLT which provides that a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

i. the reservation is prohibited by the treaty;
ii. the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
iii. in cases not failing under subparagraphs (i) and (ii), the reservation is incompatible with the object and purpose of the treaty. Even if a state is allowed

12 *Democratic Alliance v Minister of International Relations and Co-operation* [40].
13 *Democratic Alliance v Minister of InternationRelations and Co-operation* [44].

to exclude some provisions of a treaty to which it is party, it can only do so if the effect of the reservation is not to undermine the object and purpose of the treaty. A treaty may altogether disallow the making of reservations or only allow reservations to certain provisions of the treaty. In the case of permissible reservations, a state may not formulate a reservation that cannot be reconciled with the object and purpose of the treaty. Of further importance is the fact that a reservation must be made at the time of signing, ratifying, accepting, approving or acceding to a treaty and not thereafter.

In the *Genocide Convention*[14] case it was held that if the reservation is not compatible with the object and purpose of the Convention, then the reserving state cannot be regarded as being a party to the Convention. The court also added that a state objecting to a reservation that it considers to be incompatible with the object and purpose of the Convention is entitled to consider the reserving state not to be a party to the Convention. For states with the opposite view, the reserving state will then still be considered to be a party to the Convention.

Acceptance by a state party of a reservation made by another state party causes the latter to be a party to the treaty in relation to the accepting state, if or when the treaty is in force between them. In the case of a contracting state objecting to a reservation, the objection will not preclude the entry into force of the treaty between the objecting and reserving state, unless the objecting state expressly indicated a contrary intention. An act expressing a state's consent to be bound by a treaty and containing a reservation will take effect as soon as one other contracting state has accepted the reservation. It must also be noted that reservations and objections can be withdrawn at any time, or as stipulated by the treaty itself.

Together with article 19 of the VCLT and the ICJ's advisory opinion, it should be clear that the general rule is that all treaties may be accepted subject to reservations. If the treaty is silent on the question of reservations, it may be

[14] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* ICJ Reports 1951 (*Genocide Convention).*

assumed that reservations are allowed. Due to the fact that treaties are consensual and a proposed reservation is an offer, it stands to reason that the other parties to the multilateral treaty may do one of two things. Such states may either accept the reservation or reject the reservation made by another state.

Application to the facts

Dondon Republic wants to sign the following treaties: the Convention on the Rights of the Child; the Convention for the Elimination of All Forms of Discrimination Against Women; the African Charter on the Rights and Welfare of the Child; and the Agreement Establishing the African Continental Free Trade Agreement. The Minister upon signing, indicates that the State of Dondon will enter reservations on clauses that provide for: the equality of men and women; the right to education for girls; the right to marry and found a family.

From the names of the treaties to be concluded and the reservations by Dondon Republic the purpose and object of the treaties in question will be defeated. Dondon Republic does not believe in equality and yet want to be a party to the Elimination of All Forms of Discrimination Against Women treaty, reserving on the equality of men and women will defeat the purpose and object this treaty. Further, Dondon Republic wants to reserve on the right to education for girls of which the Convention on the Rights of the Child treaty aims to protect such rights. Lastly, the reservation on the right to marry and found a family will also defeat the purpose of the Agreement Establishing the African Continental Free Trade Agreement.

c) Invalidity of treaties in general

The invalidity of a treaty, or of the consent of a state to be bound by a treaty, may only occur through the application of the VCLT. The validity of a treaty can be contested on the basis of error, fraud, corruption or coercion of a state representative.

An error will invalidate the consent to be bound by a treaty if it relates to a fact or situation that was assumed by the consenting state at the time and which formed an

essential basis of that state's consent to be bound. However, this will not apply if the state contesting the validity contributed by its own conduct to the error, or, if under the circumstances, the state should have known about a potential error.

Consent to be bound by a treaty will also be invalidated if the consent was induced by the fraudulent conduct of another state or procured through the corruption or coercion of a state representative.

The following are the circumstances under which a party may raise invalidity of a treaty:

i. A state may invoke error if it assumed that a fact or situation which was material and formed the basis of consent when the treaty was concluded and it did not itself contribute to the error or the circumstances were not suspicious.
ii. A state may invoke fraud if it was induced by fraudulent action of other negotiating states to conclude the treaty.
iii. A state may invoke corruption if there was direct or indirect corruption of the state's representative by another negotiating state.
iv. A state may invoke coercion where there was coercion of a representative by acts or threats against the representative by any person.
v. A state may invoke force if there was coercion of a state by threat or use of force contrary to the principles of international law in the UN Charter.

A treaty will be rendered void in two instances: first, if the conclusion of the treaty has been induced by the threat or use of force in violation of the principles of international law embodied in the UN Charter and secondly, if at the time of its conclusion it was in conflict with a peremptory norm of general international law. Article 53 of the VCLT defines a peremptory norm (*jus congens*) as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

QUESTION 4

a) Forms of jurisdiction that a court could rely on under international law

i. The principle of territoriality

In terms of the principle of territoriality all crimes committed or alleged to have been committed within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens. This principle is 'universally recognized', and, as a matter of practice, states routinely assert jurisdiction over criminal acts that occur within their territory and over the persons responsible for such acts.

ii. The nationality principle

In terms of the nationality principle, a state may choose to exercise jurisdiction over crimes committed abroad when they are commited by nationals of that state. The link or connecting factor between the state and the conduct in question is the nationality of the perpetrator.

iii. Passive personality

In terms of the passive personality principle, a state may choose to exercise jurisdiction over extraterritorial crimes committed, or intended to be committed, against their nationals (and in some instances their ordinary residents). Here, the link between the state and the conduct in question is the nationality of the victim of the crime in question. This principle is in a sense the 'reverse of the coin' of the nationality principle.

In the *Arrest Warrant* case it was held that passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

iv. The protective principle

A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.

v. *The effects principle*

In terms of this principle, a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.

vi. *Universal jurisdiction*

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

b) Methods of peaceful settlement of international disputes

i. *Negotiation*

The ICJ has emphasised that the parties 'must negotiate with the aim of arriving at an agreement, and not merely go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement.' Negotiations must be a genuine attempt to engage in discussions.

ii. *Mediation*

In this instance, the states are assisted through the intervention of a third party (the mediator). The mediator is actively involved in conveying each party's proposals and ideas, and looking for a solution to the problem. Mediation is also known as 'good offices.

iii. *Conciliation*

In this instance, a commission set up for that purpose, either permanently or an ad hoc basis, and it assists the parties to the dispute. This is a formalised form of

mediation and it is usually decided upon through a bilateral arrangement. See the prescribed textbook for a number of such treaty examples.

iv. Inquiry

Article 9 of the 1907 Hague Convention for the Pacific Settlement of Disputes provides that where the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation. An important example, is article 34 of the UN Charter, which provides that the Security Council is to investigate disputes which are 'likely to endanger the maintenance of international peace and security.'

v. Arbitration

Arbitration has been defined by the International Law Commission as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.
Parties must agree on:

- The identity of the arbitrators
- The content of the legal question(s)
- What rules of law would apply to the dispute (they are not necessarily rules of public international law)
- The time frame within which the award must be made
- That the award will be final and binding.

vi. Judicial Settlement by the International Court of Justice

The International Court of Justice is the judicial organ of the United Nations and its procedures are governed by the ICJ Statute.

The judges of this court are expected to recuse themselves, if they have been involved as counsel to one of the parties to the dispute, or in some other

capacity. However, the mere fact that their state of origin is one of the parties will not on its own be grounds for recusal. In fact, a state may appoint an ad hoc judge, which is one of its nationals, to sit on the case.

Two types of proceeding may be brought before the ICJ:

- Contentious proceedings where there is a dispute between two (or more) state parties. In these cases, the court will hand down judgment which will be binding on the parties.
- Advisory opinions on questions of international law referred to it by the existing UN organs or its specialised agencies. These opinions are not binding.

Article 34 of the Statute provides that only states may be parties in cases before the ICJ, although the court may request organisations to place information before it.

States must agree to the ICJ's jurisdiction. Article 36(1) provides that the ICJ will have jurisdiction in all cases "which states in a dispute may agree to and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force".

States may submit an existing dispute to the ICJ once they have reached a special agreement to that effect. The court may also be able to exercise jurisdiction which is implied. This happens when one state has initiated proceedings and has agreed to the court's jurisdiction, while the other state has not expressed its consent, but has acted in a way from which consent may be inferred.

Furthermore, articles 36(2) provides that:

"[T]he states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to

any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- the interpretation of a treaty;
- any question of international law;
- the existence of any fact which, if established, would constitute a breach of an international obligation;
- the nature or extent of the reparation to be made for the breach of an international obligation."

This article allows for states to accept the court's jurisdiction by way of declaration. It may be unconditional, but is usually subject to conditions and operates on the basis of reciprocity vis-à-vis certain states, on a given subject-matter and for a limited period of time. Thus, a state which has made such a declaration may bring another state (which has accepted the same obligation) before the ICJ.

Lastly, the judgments of the court are binding only on the parties involved, in other words there is no precedent system.

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LCP4801 MAY/JUNE 2018

QUESTION 1

The Montevideo Convention demands that a state should have a permanent population (present in this instance); a defined territory (a requirement which is satisfied); the capacity to enter into foreign relations (apparently demonstrated by the conclusion of international agreements); and an effective government.

1. Defined territory

   Defined borders are not a prerequisite for statehood. Israel's borders have been disputed for a very long time and even South Africa's borders with, for example, Swaziland, are the subject of debate (North Sea Continental Shelf case). Alaska, is separated from the USA by Canada.

2. Permanent population:

   A nomadic population is not a bar to statehood. In the Western Sahara case the court found that the fact that the population is nomadic does not exclude statehood. Rather than looking at the situation of the population in a specific place, one should consider whether the population lives in accordance with an organised, recognisable social and political structure. If it does the population requirement has been met. The important point is that the population must have some sort of relationship to the would-be state.

3. Effective government:

   The question is whether there is 'a system of government in general control of its territory to the exclusion of other entities'. In the present example, A has its own executive organs (there is a reference to a Minister of Foreign Aff airs), although it is not entirely successful in conducting foreign relations through them. It would also appear to have an independent legal system and its own courts.

4. Capacity to enter into relations with other states:

   This particular characteristic seems to be problematic. This requirement means that a

state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. The fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of its statehood (*R v Christian*). What is important is the presence of external sovereignty. This requirement is also closely linked to the issue of recognition: if the other members of the international community refuse to recognize a state and to enter into relations with it, that state will for all practical purposes be deprived of its capacity to enter into relations with other states.

Recognition

The "requirement" of recognition is not specifically mentioned in the Montevideo Convention. However, it is crucial in practice and underlies the ability of the state to enter into relations with other states. The dilemma as to whether or not recognition is one of the requirements for statehood has given rise to two theories: Declaratory theory, and the constitutive theory.

i. Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality.
ii. The proponents of the declaratory theory advocate that the act of recognition is not requirement of statehood; statehood and international legal personality arise the moment the requirements of the Montevideo Convention have been fulfilled. These two theories have been evaluated by a South African court in *S v Banda*. The court came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable because: It was objective, and it took into account only those 4 requirements which are based on well-established rules of international law.The court criticized the constitutive theory for being arbitrarily applied and politically based.

As pointed out, however, the point remains that one can't completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations depends on recognition, and if it is not recognized by a sufficient number of states.

In Doe v Karadžić the court observed that the current Bosnian-Serb warring military faction did not meet the definition of state (the latter being defined as an entity which has "a defined and a permanent population, [which is] under the control of [its] own government, and [which] engage[s] in or [has] the capacity to engage in, formal relations with other such entities". The situation in the former Yugoslavia was such that the military factions at the time were not stable, or sufficiently identifiable. "The Bosnian-Serbs have achieved neither the level of organization nor the recognition that was attained by the PLO [Palestinian Liberation Organization], as manifested by the PLO's achieving the position of a permanent observer at the UN."

In Kadic v Karadžić the court did not answer the question directly, but remarked as follows at 245: Appellant's allegations entitle them to prove that Karadžić's regime satisfies the criteria for a state for purposes of those international law violations requiring state action. Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law. Moreover, it is likely that the state action concept, where applicable for some violations like 'official' torture, requires merely the semblance of official authority. The inquiry, after all, is whether a person purporting to wield official power has exceeded internationally recognized standards of civilized conduct, not whether statehood in all its formal aspects exists."

If you were the judge, you would probably have grappled with two requirements, namely effective government and the contested requirement of recognition by other states. These might have proved problematic in the context of Republika Srpska, depending on whether you supported the constitutive or declaratory theory of recognition.

It is worth noting that today Republika Srpska is not a state on its own, but forms part of Bosnia and Herzegovina. The latter has levels of political entities established under a federal government. Republika Srpska is the one and the Federation of Bosnia and

Herzegovina the other. They were formally established by the 1995 Dayton Peace Agreement. Lastly (in case the thought crossed your mind) Republika Srpska and Serbia are not one and the same.

QUESTION 2

Section 231 (4) provides as follows: Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

What does the section provide? First, to apply in our law (municipal law) all treaties (international law) must be "enacted as law by national legislation". This means the international law or treaty has to be changed into a law through legislation. In other words, a process of transformation or incorporation is taking place. Such a process is a characteristic of dualism. The first part of s 231(4) is therefore clearly dualist.

The section does not end there and it makes provision for an exception, namely self-executing treaties (international law) that are regarded as "law in the Republic". This differs from the first part of s 231(4) because no process is required to transform the treaties into law. They are law because the Constitution says they are law. This is clearly a monist approach.

Note that self-executing treaties (s-e treaties) must meet one important criterion before it can obtain the status of law. This is that they must not conflict with the Constitution or an Act of Parliament. This means that the status of the Constitution or an Act of Parliament is superior to that of a self-executing treaty. Therefore, municipal law will prevail in the case of conflict. This is also dualist.

A self-executing treaty is defined by Shearer as: [A treaty] which does not in the view of American courts expressly or by its nature require legislation to make it operative within the municipal field, and that is to be determined by regard to the intention of the signatory

parties and to the surrounding circumstances.

The first part of s 231(4) that requires incorporation through legislation is clearly dualist. The exception (self-executing treaties) appears to be monist in that no act of transformation is required. However, as the municipal or national law will prevail in the event of a conflict with the Constitution or an Act of Parliament, the possibility of a dualist leaning cannot be excluded.

As discussed, on the basis of section 231(4) of the Constitution, there are only two ways in which a treaty can become part of our law, and therefore form the basis for action in our national courts, namely the following:
1) If it has been made part of our law by legislation.
2) If it is self-executing (in which case it is automatically part of our law).

Quagliani involved an extradition treaty validly concluded between South Africa and the United States of America. This treaty had not (by all the parties' admission) been incorporated by legislation. Therefore, in terms of section 231(4), the treaty could not be used by the court unless it was found to be self-executing. Justice Sachs confirmed that the extradition treaty had not been incorporated by legislation. He also held that he was not finding that the treaty was self-executing.

However, he somehow found that it was enforceable in our law! Thus, he seemingly created a third, unspecified manner in which treaties become law in South Africa (unspecified because it is not one of the two ways provided for by section 231(4)). This is the enigma that the *Quagliani* judgment has brought into our law.

QUESTION 3

A state has a right to protect its nationals abroad who have been injured by the actions of the foreign state. The state may take up the case of its subject by resorting to diplomatic action, or international judicial proceedings. The cornerstone of this right is that an injury to a national is considered to be an injury to the state. Therefore, under international law,

the right of diplomatic protection vests in the state. The state is not under any duty to exercise its right. While the domestic laws of a state may impose such obligation, international law does not. The interesting question is whether South African law imposes such an obligation on the South African government. In this context we shall consider the cases of *Kaunda, Van Zyl* and *Von Abo.*

1) *Kaunda*

The facts in *Kaunda* may briefly be summarised as follows: a number of South Africans had been arrested in Zimbabwe and Equatorial Guinea in connection with charges relating to mercenary activities and plotting a coup against the President of the Equatorial Guinea. Those arrested in Zimbabwe feared that they would be extradited to Equatorial Guinea. All the Applicants claimed that they would not receive a fair trial in Equatorial Guinea. Furthermore, they contended that, if they were convicted in Equatorial Guinea, they would be sentenced to death. They claimed, therefore, that the South African government was under an obligation to offer them diplomatic protection.

The court dismissed the application. The majority decision, written by Chaskalson CJ (as he was then known), recognised that international law did not oblige a state to provide diplomatic protection, but in terms of the South African Constitution, there was at least some obligation on the part of the government to provide protection to its nationals abroad.

The court began by asserting that a request to the South African government for diplomatic protection was unlikely to be refused if there had been a gross violation of international human rights norms, and the evidence to that effect was clear. Should a request for diplomatic protection ever be refused "the decision would be justiciable, and a court could order the government to take appropriate action".

The court also noted that the assertion of diplomatic protection was "essentially a function of the executive" with which the "courts are ill equipped to deal". However, if

the executive were to refuse to consider a legitimate request, or if it were to deal with it in bad faith or irrationally, the court could intervene. In other words, while the executive has a broad discretion when conducting foreign affairs, the courts can review such decisions on the grounds of, for example, irrationality and bad faith.
In a concurring opinion, Ngcobo J, examined, *inter alia,* section 3 (the right to a common South African citizenship) and section 7 which provides that:

i. The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
ii. The state must respect, protect, promote and fulfill the rights in the Bill of Rights.

Ngcobo J concluded that "diplomatic protection is a benefit within the meaning of section 3(2) (a). It follows therefore that sections 3(2) (a) and 7(2) must be read as imposing a constitutional duty on the Government to ensure that all South African nationals abroad enjoy the benefits of public protection. The proposition that the Government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the Government's own declared policy and acknowledged constitutional duty".

The dissenting opinion of O'Regan J acknowledged that the conduct of foreign affairs is typically an executive power under the Constitution and submitted that, in the conduct of foreign relations, "the executive must be afforded considerable latitude". She suggested that the court should declare that the executive was "under a constitutional obligation to take appropriate steps to provide diplomatic protection", but that the executive itself was best placed to determine what steps it should take.

2) <u>Van Zyl</u>

In *Van Zyl* the applicants requested the South African government to extend diplomatic protection to them in their dispute with the government of the Kingdom of Lesotho. The dispute related to expropriation of the applicants' mining leases, mining rights and tributing agreements without compensation being paid to them. The

contracts referred to were not internationalized. The expropriation had taken place in execution of the Lesotho Highlands Water Project. The latter was provided for in a treaty between the SA government and that of Lesotho.

It was claimed that the applicants were entitled to diplomatic protection, because the government of Lesotho had committed an international delict. The SA government had refused the application on the grounds that no right to diplomatic protection accruing to an individual existed in international law (since, in deciding to exercise diplomatic protection, the SA state would have been inserting its own right). The applicants also contended that inaction by the SA government would lead to a violation of a number of provisions of the SA Constitution.

Ultimately, the application was dismissed. Amongst others, the applicants could not prove that Lesotho had committed an international delict, nor did they satisfy the two prerequisites for the admissibility of a claim for purposes of diplomatic protection (nationality and exhaustion of local remedies.) The court pointed out that neither international law, nor the Constitution recognised the right to diplomatic protection. The court distinguished the case from *Kaunda* in that the latter concerned gross human right violations, while in the *Van Zyl* case the applicants had been expropriated and international law did not recognise the protection of property as an international human right.

3) *Von Abo*

In *Von Abo* the applicant was a South African farmer in Zimbabwe. Zimbabwe had violated his rights by destroying his property interests in many Zimbabwean farms as part of a governmental scheme of expropriation. Von Abo was not compensated and he had exhausted all local remedies. Von Abo requested the South African government to afford him diplomatic protection *vis-à-vis* Zimbabwe. The applicant claimed that he had a right to such protection in terms of the South African Constitution. Relying on the judgment in *Kaunda*, the court in *Von Abo* found that there need not be an actual refusal on the part of government to grant diplomatic protection

before a court would intervene. The court stated that, in an appropriate case, a court could also come to the assistance of the aggrieved national where government "fails to respond appropriately" or "deals with the matter in bad faith or irrationally". The court relied on, *inter alia*, the judgment in *Kaunda* to conclude that the state had a duty to provide assistance to the applicant. This was a Transvaal Provincial Division judgment.

QUESTION 4

4.1 Bases of jurisdiction under international law

a) Territoriality: A state has jurisdiction over all criminal acts occurring in its territory and over all persons committing such acts.
b) Effects: A state has jurisdiction over acts performed outside its territory which have an effect inside its territory.
c) Nationality: A state has jurisdiction over its own nationals wherever they act.
d) Passive personality: Where a foreigner violates the rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner.
e) Protective principle: A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.
f) Universality: In the case of international crimes any state may claim jurisdiction. The tradition, customary law international crimes are piracy, war crimes, and crimes against humanity.

4.2 Application to the facts

a. New Zealand can exercise jurisdiction on the basis of state protection for attacks against the government. In *R v Neumann* the court stated that a sovereign state is automatically entitled to punish crime directed against its independence and safety by an alien, provided that the alien has a connection to the state, such as residence. In *R v Holm* and *R v Pienaar* the court held that no international custom debars a state from trying and punishing offenders who committed acts of treason against South Africa overseas.

b. Mozambique and South Africa can both exercise jurisdiction in the shooting of a French tourist on the basis of territoriality. In *Bankovic v Belgium* the court remarked that “the jurisdictional competence of a state is primarily territorial”.

c. In this regard, South Africa can exercise jurisdiction on the basis of subjective territoriality, since the shooting started on its territory. Mozambique can exercise jurisdiction on the basis of objective territoriality, since the shooting was completed there. Objective territoriality is sometimes referred to as “effects” and in *S v Mharapara*, the court observed that the determining factor was the “place of impact, or intended impact, of the crime”.

d. France could exercise jurisdiction for the shooting of a French tourist on the basis of passive personality. In *United States v Yunis*, a US court relied on the principle of passive personality to exercise jurisdiction over a Lebanese national who had hijacked an aircraft with US nationals onboard.

e. Theoretically, U.K can exercise jurisdiction for the shooting of a French tourist on the basis of nationality but, traditionally, Anglo American common law countries have not exercised jurisdiction over their nationals who have committed crimes abroad unless domestic law has made specific provisions to that effect.

LCP4801 OCT/NOV 2018

QUESTION 1

1.1 False: International law is the law between states. In other words, inter law regulates the external relations between states. Therefore, states are the subjects of international law and the relations they have with each other may be bilateral or multilateral. Hence, private individuals are not subjects of inter law.

1.2 False: judicial decisions in the context of article 38(1) (d) include decisions of the ICJ, other international courts and tribunals as well as national courts. In this regard it must be noted that the law of precedent does not apply in international judications.

1.3 False – in terms of the passive personality principle where a foreigner violates rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner. Therefore, state Y can claim jurisdiction.

1.4 False - It is important for a state's territory to be defined. There is no required minimum size. States territories come in all shape and sizes. They range considerably in size. The Vatican City for example is less than a square km in size.

1.5 True

QUESTION 1.2

The differences between national law and international law:

International Law	**National Law**

1. There is no legislator in international law	Complete legislative process (think parliament)
2. There is no precedent system	Precedent system applies
3. The state is a judge in its own case	Nemo iudex in sua causa – No one may be a judge in his/her own case.
4. There is no executive to enforce judgements – sanctions are poorly developed	There is a complete executive machinery in order to enforce judgments
5. The subjects of international law are generally states or international organisations	The subjects of national law are individuals or legal persons

Similarities

International Law	**National Law**
1. Comprises accepted norms prescribing state behaviour	Comprises accepted norms prescribing behaviour
2. Uses writings, etc. of jurists rather than morality	Writings of jurists and precedent are freely used
3. Can consciously be altered by treaty	Can consciously be altered by statute/ legislation

QUESTION 2

For an entity to qualify as a state, it must meet all the requirements for statehood. The Montevideo Convention of 1933 provides the following definition: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states”.

Permanent population

The “permanent population” requirement does not mean that there is a required minimum number of people. Furthermore, the fact that a population is nomadic does not affect statehood adversely, as was pointed out by the court in the *Western Sahara* case. What is important for the purpose of the “permanent population” requirement is that the population lives in accordance with an organized, recognizable social and political structure with a clear chain of command.

Defined territory

It is important for a state’s territory to be defined. There is no required minimum size. This requirement does not imply that the territory must have undisputed borders. Israel serves as an example: despite the ongoing dispute with Palestine, Israel still satisfies the requirements for statehood. Furthermore, the territory need not necessarily form one single unit. What is important is that the state must be sufficiently homogenous to be able to perform its function of government effectively (eg USA and Alaska separated by Canada; East and West Pakistan were separated by India). In other words, there must be a stable community within an area over which its government has control. If the territories are so dispersed that such control cannot be exercised in all of them, statehood will not be granted. The case of *Van Deventer v Hancke & Mossop* is an example of a case where a community of people, ruled by a particular government, qualified as a state despite the fact that it had no territory.

Effective government

The entity must have a government that is independent of any other authority, and it must have legislative and administrative competencies. Brownlie suggests some guidelines which can be used to assess a government's effectiveness:

1. Does it have its own executive organs?
2. Does it conduct relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

If the answer to these questions is yes, that is an indication of an effective government.

Capacity to enter into relations with other states

This requirement means that a state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. The fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of its statehood (*R v Christian*). What is important is the presence of external sovereignty. This requirement is also closely linked to the issue of recognition: if the other members of the international community refuse to recognize a state and to enter into relations with it, that state will for all practical purposes be deprived of its capacity to enter into relations with other states.

Recognition

The "requirement" of recognition is not specifically mentioned in the Montevideo Convention. However, it is crucial in practice and underlies the ability of the state to enter into relations with other states. The dilemma as to whether or not recognition is one of the requirements for statehood has given rise to two theories: Declaratory theory, and the constitutive theory.

iii. Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality.
iv. The proponents of the declaratory theory advocate that the act of recognition is not requirement of statehood; statehood and international legal personality arise the

moment the requirements of the Montevideo Convention have been fulfilled. These two theories have been evaluated by a South African court in *S v Banda*. The court came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable because: It was objective, and it took into account only those 4 requirements which are based on well-established rules of international law.The court criticized the constitutive theory for being arbitrarily applied and politically based.

As pointed out, however, the point remains that one can't completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations depends on recognition, and if it is not recognized by a sufficient number of states.

QUESTION 3

a) Grounds of intervention under Article 4(h) of the African Union Constitutive Act

Article 4(h) of the Constitutive Act of the African Union (2000) provides as follows:

The Union shall function in accordance with the following principles: the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

The AU can intervene in respect of grave circumstances such as war crimes, genocide and crimes against humanity. This was motivated in large part by dissatisfaction with the current international legal regime, which had failed to prevent atrocities in Africa during the 1990s.

War crimes include killing of protected persons; mistreatments committed against any persons such as torture, mutilation, sexual violence, attacks on buildings dedicated to religion, education, art and science and historical monuments.

Crimes against humanity include widespread attack against civilian population such as murder, enslavement, enforced disappearance of persons, deportation and forcible transfer of population.

Genocide includes killing members of a particular group, causing bodily harm to members of a group, physical destruction of a group.

b) AU's intervention requires Security Council's authorization

The UN generally prohibits the use of force. There are exceptions under article 51 of the UN Charter (individual or collective self-defence if an armed attack occurs against a member state). Such action must be authorised by the Security Council under Chapter VII. Article 53 of the Charter notes that regional organisations or agencies must first obtain authorisation of the Security Council before undertaking enforcement actions.

However, if the intervention takes place by invitation – that is, consent, of the member state – the need to seek prior Security Council authorisation falls away, since the invitation itself will constitute sufficient justification for the intervention. However, in such circumstances, the invitation must come from a government whose status and legal authority to seek assistance are not in dispute and the consent itself is clear and unambiguous.

Note also that consent as a justification for intervention cannot be relied upon if the action taken is directed against the government itself. For instance, this will be the case where the actions of the government of the territorial state are the cause of the humanitarian crisis and the AU is forced to act against that government under article 4(h) of the AU's Constitutive Act.

A related issue is whether member states of the AU's Constitutive Act, by virtue of their membership, have given advance consent for the kind of action contemplated in

article 4(h). There are two possible responses to such an interpretation. The one is that the lawfulness and validity of an invitation (consent) (to which the AU has a right to respond) can only be determined at the time and in the circumstances of the crisis; advance consent to intervene in article 4(h) crises sometime in the future makes such an assessment impossible and disregards the sovereign right of the territorial state to determine for itself the cause of action in the actual circumstances of the situation. The other is that the AU may then rely on advance consent to exempt itself from seeking and obtaining prior Security Council authorisation for enforcement action under article 4(h).

This is certainly not commensurate with the overall purpose of the UN Charter's legal regime on the use of force – in particular, that of article 53. In general, the powers and functions of the AU, especially those under article 4(h) of the AU's Constitutive Act, cannot be interpreted with disregard for article 103 of the UN Charter. This provision states: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 4(h) can be seen as advance consent given by member states but it can be argued that since the AU has committed itself to international law, it still has to get authorisation before intervention. In conclusion, the AU has to get authorisation from the UN before intervening in South Sudan

c) Legal significance of AU's intervention in South Sudan

The commitment to its principles obligates the AU to intervene on the grounds of Responsibility to Protect in order to protect civilians. There is an obligation on the part of the AU to intervene based on Article 4(h), especially on the grounds on crimes against humanity, which was highlighted in the report by the African Commission. The AU should approach the UNSC to get an authorisation to act in this regard.

Centralization of force, in the hands of the Security Council, is crucial for the safety of the international community. Subsequently, any regional actor willing to use force

should always request authorization from the Security Council. This rule also applies to regional organizations such as the AU. If due to a lack of unanimity among its members, the Security Council cannot pronounce itself on whether to give or to refuse such authorization, while grave crimes such as those mentioned in article 4(h) of the AU Constitutive Act are taking place on the continent, the AU has a right to intervene and to put an end to genocide, war crimes or crimes against humanity.

However, having this right does not mean that the AU would effectively use it. Like the OAU, the AU is still acting as a 'heads of state club'. Most African leaders lack national legitimacy, many of them elected in a dubious context with a minimal respect for their own national constitutions. In this context, article 4(h) appears to be a mere political act of frustration, rather than a real ambition to protect civilians from grave atrocities committed by their leaders or other armed groups. We could, therefore, conclude that the AU has the right to intervene in South Sudan in accordance with article 4(h) without authorization by the Security Council when the latter is unable to pronounce itself. However, the current context does not allow one to affirm that the AU effectively plans to use this right.

QUESTION 4

Reservation to treaties

Article 2 (1) (d) of the Vienna Convention of the Law of Treaties defines a reservation as a “unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state”. Article 19 of the Vienna Convention provides that a State may formulate a reservation unless:

Reservation is prohibited by the treaty;

- the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
- the reservation is incompatible with the object and purpose of the treaty.

When dealing with reservations to treaties under international law, a few basic principles should be borne in mind from the start namely:

1. Reservations arise only in multilateral treaties. In a bilateral treaty, a reservation is in fact an offer by the objecting state to conclude a different treaty. If this offer is accepted, a new treaty comes into operation;
2. It must be remembered that treaties are consensual. States cannot be forced to accept that which they do not wish to accept.
3. The aim of a multilateral treaty is to get as many states as possible to agree on as many issues as possible. Reservations allow a state which does not agree with all the provisions in a treaty to still become a party to the treaty and be bound by those provisions which it agrees to.

General rule

All treaties may be accepted subject to reservations. If the treaty is silent on the question of reservations, it may be assumed that reservations are allowed.

Treaties = consensual & proposed reservation = offer. The other parties to the multilateral treaty can either;

i. ***accept*** the reservation or

ii. ***reject*** the reservation.

*****When a state neither accepts nor did check the reservation = the failure to object to a reservation is taken to mean **tacit consent to the reservation**.

*****When a state objects to a reservation it can:

- simply **object to the reservation**, but not to the operation of the treaty. The treaty will operate between the two states minus the offending clause **or**
- to the object **of the** reservation & to the treaty **coming into operation** between itself and the reserving state. No treaty will operate between the two states.

GENOCIDE CONVENTION CASE (STRYDOM (74-75)

What effect does a reservation have on the multilateral treaty?

Treaty obligations between states accepting the reservation and the reserving state.	Treaty obligations between states of rejecting the reservation and the reserving state.
▪ Acceptance may either be express or tacit. ▪ The entire treaty applies between the parties. ▪ **BUT**, the provision in the original treaty to which the reservation has been entered will be replaced by the provisions in the reservation. ▪ **NB**: If state "A" accepts a reservation to a treaty made by state "X" but state "B" object to such a reservation, the treaty plus the reservation bind "A" and "X", while "A" and "B" remain bound by the original treaty.	➢ The rejection of a reservation must be express. ➢ Where a state rejects a reservation, the reservation doesn't come into operation between the reserving and the rejecting states = there is no consensus. ➢ **BUT**, the clause to which the reservations is entered also cannot apply = no consensus, & it is removed from the treaty **for those parties**. ➢ If a *lacuna* (vacuum) arises from the cancellation of the clause, customary international law will apply to that aspect. ➢ The rest of the treaty (all the provisions minus those who reach reservations have been entered) applies between the parties. ➢ If the state **rejects the reservation** and a **treaty coming into operation**, the treaty will not operate between the two states.

	➢ **NB**: treaty obligations between all non-reserving parties remain unaffected by the reservation! reservations have been entered) applies between the parties. ➢ If the state **rejects the reservation** and a **treaty coming into operation**, the treaty will not operate between the two states. ➢ **NB**: treaty obligations between all non-reserving parties remain unaffected by the reservation!

Termination of a treat

1. Fulfillment of obligation

   Treaties concluded to serve a specific purpose will terminate once the object of the treaty has been fulfilled. For example, after postelection riots in Kenya in 2007, there was a food shortage. SA and Kenya concluded a treaty for the delivery of maize. Once the maize had been delivered, the object of the treaty had been fulfilled and the treaty will terminate.

2. Treaty provision

   Where a treaty specifically provides that it may be terminated in a specific way, the treaty will terminate if the prescribed procedure is followed. For example, Article XVIII of the extradition treaty concluded between Great Britain and Peru provides: "[This treaty] may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months". If the necessary notice is given, the treaty will terminate once this period has passed.

3. Consent

   If all parties concerned agree to its termination. Conclusion of a new treaty If all the original treaty parties conclude a new treaty which covers the same subject matter and it appears that the parties intended the new treaty to govern the issues, or the two treaties conflict to such an extent that they cannot operate concurrently.

4. Impossibility of performance

   If an object indispensable for the performance is permanently destroyed, and this isn't the fault of the party raising impossibility.

5. Breach of treaty

   The first requirement is that the breach of the treaty must be material or, in simple terms, ''important''. Article 60(3) defines ''material'' as: a repudiation not allowed by the VC, or the violation of a provision essential for the achievement of the object or purpose of the treaty.

6. Fundamental change of circumstances

   The following requirements must be fulfilled:

   i. The existence of the circumstances must have been an essential basis for the conclusion of the treaty.
   ii. The change of circumstances must drastically transform the extent of the state parties' obligations.
   iii. The circumstances (which a state claims to have been changed) existed at the time the treaty was concluded. The change in circumstances must have been unforeseen by the parties.

7. Ius cogens

   If the treaty is in conflict with a newly developed *ius cogens*, it is automatically terminated.

8. Unilateral repudiation

Where the treaty itself doesn’t provide for withdrawal or denunciation, there can be no withdrawal unless: the parties intended such a right, or the nature of the treaty implies such a right.

LCP4801 MAY/JUNE 2019

QUESTION 1

Following the expansion of the international community to include Latin American and African states in the nineteenth and twentieth centuries, international law has had to adapt to accommodate the divergent interests. It is of utmost importance to note that, the history of International law encompasses four distinct periods; the period from 1500 to 1648, period from 1648 to 1815, period from 1815 to 1914 and the World Wars and thereafter. Umozurike shares the following sentiments about the genesis of Africa and International Law, he states that the colonisers of Africa never considered that the deprivation of the sovereignty of African people was contrary to international law. In fact, they interpreted the law to justify their activities.

Important at this stage is that the emergence of states as separate entities (with legal personalities separate from those of their respective subjects) and with their own governments (which exercise authority over a particular territory) kick-started and influenced the development of international law in a number of ways. First, the concept of state sovereignty was born. State sovereignty means that the state may decide what to allow within its borders without interference from other states. This was a particularly strong principle which persists as one of the pivotal rules of international law[15] although concerns for the protection of human rights may have relaxed its strict meaning. Secondly (and perhaps more obviously) these entities have to interact with one another on a daily basis – hence the *raison d'être* of the constantly evolving international law rules.

Modern day international law has its roots in European common law, ignoring the extent to which African customary law informed interactions between pre-colonial African Kingdoms and other European actors. Suffice to say that, it is central to note the extent to which colonialism played an important role in eliminating contributions of pre-colonial African kingdoms to the practice of international law. A good example was the Berlin Conference of 1884 called by Bismarck at the request of Portugal for managing relations

among increasingly voracious colonial powers in Africa and laying a legal foundation for colonialism. In a nutshell, the conference was about agreement on the rules – without the participation of African representatives.

This also meant that African rulers lost control over the subsequent boundary agreements between the European powers by means of which territories in Africa were carved up and over external relations affecting them, having been subsumed under the sovereigns of the colonial powers. The legal justification for the acquisition of territories that the colonial powers considered not to be states or nations by Western standards and whose inhabitants did not exercise governmental sovereignty, as it was understood by the colonial powers. Henceforth, in Africa, although there were more or less distinct forms of political organization, these were not sufficient to make it possible to speak of a real state. Therefore, they were not subjects of international law and their territory was ownerless in international law.

In order to achieve a stated common purpose (provided it is not prohibited by international law), states may choose to group themselves in various organisations. Such an organisation acquires a separate personality of its own (see *Reparations for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep 174), and its purpose and capacities are circumscribed by the states which have founded it. Examples of such organisations are the OAU which was replaced in 2002 by African Union (AU), which adopted, as a founding principle, a commitment to promote peace, security and stability on the continent. Furthermore, the AU Constitutive Act establishes an ambitious institutional framework for the maintenance of peace and security, including a Peace and Security Council and proclaims a right of intervention for the AU in member states in certain circumstances.

In conclusion it is crucial to note that international law is a dynamic field, which changes with the shifting needs of the members of the international community (be it Europe or Africa). For example, the emergence of the individual as a ‘quasi-subject’ of international law arose after the international community had realised that it could not allow a repetition

of the atrocities committed during the two world wars and also in Africa for example the Genocide in Rwanda. International human rights law gained prominence, the concept of strict state sovereignty eroded further, and individuals gained the right to, for example, petition international human rights bodies. A further related development is the emergence of international criminal law – and the idea that states should assist one another in bringing individual perpetrators of war crimes and crimes against humanity to justice.

QUESTION 2

a) The role of the United Nations in settlement of disputes

The main purpose of the United Nations is to maintain international peace and security. It does this through its principal organs, which are the General Assembly (GA), the Security Council (SC), the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice. The primary organ charged with maintaining peace and security if the Security Council.

As with any international organisation, the GA has only the powers which are given to it in its constituent document, the UN Charter. The GA may consider and make recommendations to UN members, or the SC regarding the general principles of cooperation in the maintenance of peace and security. It may also make recommendations on any matter relating to peace and security which is referred to it by a UN member, the SC, or a nonmember state. This is subject to one proviso: the GA must refer any question which requires action to the SC before or after the GA has discussed the matter. It may further alert the SC to matters which are likely to endanger peace and security. The GA may make no recommendations on matters which are serving before the SC (unless the SC requests so).

b) The prohibition on the use of force under international law

The first important point is that states must settle their disputes peacefully.

Article 2(4): "*All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations*."

The prohibition of aggression and the use of force has been widely accepted as being a *jus cogens* norm. The article 2(4) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any state. Furthermore, article 2(7) prohibits intervention in a state's essentially domestic matters.

c) State liability under international law

States are supposed to respect the rules that define their relationship. This entails that states have diligently to perform the obligations imposed upon them by international law. This duty results from the legal personality of every state as the principal bearer of international obligations. If states fail to perform their obligation, or conduct themselves contrary to their international law commitments, they commit what is called internationally wrongful acts which may be breaches of either treaty law or customary international law.

The state in breach (responsible state) may then incur liability vis a vis the state that has suffered an injury (injured state)) as a result of the breach. State responsibility in this sense may be incurred directly or indirectly. Direct – will occur if the state, acting through its organs breaches international law obligation. Indirect – occurs when the breach injures foreign nationals or their property. Thus state liability refers to the body of rules that defines breaches of obligations of state in international law as well as the consequences of such breaches. This section focuses on the 2001 ILC Draft Articles on the responsibility of States for Internationally Wrongful Acts (DASR). which contains the modern concept of state responsibility in international law. The DASR deals with the following principles:

- The nature of the responsibility
- Wrongfulness
- Attributability

- Responsibility for the conduct of state organs
- The legal consequences of an internationally wrongful Act

Circumstances in which the question of attributability may arise:

i. Responsibility for the conduct of state organs

In terms of article 4(1) of the Draft Articles on State Responsibility, "[t]he conduct of any State organ shall be considered as an act of state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or a territorial unit of the State."

The conduct of an organ of state is regarded as an act of this state in terms of the rules of customary international law. And as it was confirmed in the Youmans Claim (*US v Mexico*, 1926), the decisive factors to consider here are whether the person acted in official capacity and while on duty

Liability as a result of a failure to act can also arise and Iran's liability in the Tehran Hostages case.

ii. Responsibility for the conduct of non-state entities exercising elements of governmental authority.

This is issue is governed by article 5 of the Draft Articles on State Responsibility, the actions of entities such as parastatal entities can result in state liability, provided that there was some exercise of governmental authority.

iii. Responsibility for the conduct of a private person or a group of persons

In terms of article 8, for liability to arise, the private person(s) must have been acting on the instructions, or have been under the control of, the state in question.

- Bosnia Genocide case - where it was held that it is not enough for the instructions to be of a general nature
- Nicaragua case - effective control of the military and paramilitary operations was required

- Tadic case - the ICTY used the ‘overall control test’.

iv. Responsibility for the conduct and insurgents and insurrectional groups

Generally, a state cannot be held liable for the acts of the insurrectional movement, because the latter has its own structures and organization. However, should that movement become the government of the state, then its actions will be considered to be the actions of that state under international law

v. Attribution based on subsequent acceptance or approval of a wrongful act

This situation is governed by article 11 of the Draft Articles on State Responsibility and is illustrated by the Tehran Hostages case.

d) Measures put in place to prevent outright conflict between states

Article 2(3) of the United Nations (UN) Charter provides: All members shall settle their international disputes by peaceful means in such a manner that international peace, and security, and justice are not endangered. The first step for most states would be to take some form of diplomatic action

i. Negotiation

They are the obligation to initiate a process of negotiation with the view to arriving at an agreement. It was reiterated by the ICJ in the *North Sea Continental Shelf Case*. Parties must conduct themselves in a manner which should render the negotiations meaningful & "*which will not be the case with either of them insists upon its own position about contemplating any modification of it*". Negotiations→ via diplomatic channels. A third party that endeavors to bring the disputing stated the negotiating table = "good offices".

ii. Mediation

The third party is actively involved in an attempt to reconcile the positions & claims of the rival states. E.g. SA is played an important role in this regard = peacemaking efforts-DRC, the Ivory Coast, Zimbabwe, etc.

iii. Conciliation

A conservation commission examines the claims of the parties and makes proposals aimed at a friendly resolution. Commission compiles a report setting out these observations, conclusions and recommendations. Content of the report is not binding on the parties.

iv. Commission of inquiry

A fact-finding commission which examines witnesses &/or visit areas where the rules of international law have allegedly been violated so as to establish the facts surrounding a disputes.

v. Arbitration

International Law Commission; "[***the] procedure for the settlement of disputes between states is a bang binding award on the basis of law & as a result of an undertaking voluntarily accepted***." The Permanent Court of Arbitration = a body which came into existence in terms of *The Hague Conventions for the Pacific Settlement of International Disputes*.

Functions = establish a body of eminent jurists from which states can select arbitrators to settle their disputes. Depends on the willingness and consent of states parties to the convention to celebrate to arbitration, and they must furthermore agree:

- **identity** of the arbitrators
- **content** of the legal questions
- **what rules** of the law will apply to the dispute.
- **timeframe** within which the award must be made
- that the award will be **final and binding**.

QUESTION 3

1. Territoriality
2. Effects (subjective and objective territoriality)
3. Nationality
4. State protection
5. Passive personality
6. Universality

- Territoriality: A state has jurisdiction over all criminal acts occurring in its territory and over all persons committing such acts.
- Effects: A state has jurisdiction over acts performed outside its territory which have an effect inside its territory.
- Nationality: A state has jurisdiction over its own nationals wherever they act.
- Passive personality: Where a foreigner violates the rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner.
- State protection: A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.
- Universality: In the case of international crimes any state may claim jurisdiction. The tradition, customary law international crimes are piracy, war crimes, and crimes against humanity.

Mpuluzi can exercise jurisdiction on the basis of state protection for attacks against the government. In *R v Neumann* the court stated that a sovereign state is automatically entitled to punish crime directed against its independence and safety by an alien, provided that the alien has a connection to the state, such as residence. In *R v Holm* and *R v Pienaar* the court held that no international custom debars a state from trying and punishing offenders who committed acts of treason against South Africa overseas.

Otse and Leribe can both exercise jurisdiction on the basis of territoriality. In *Bankovic v Belgium* the court remarked that "the jurisdictional competence of a state is primarily territorial".

In this regard, Mpuluzi can exercise jurisdiction on the basis of subjective territoriality, since the shooting started on its territory. can exercise jurisdiction on the basis of objective territoriality, since the launched propelled grenade attacks was completed there. Objective territoriality is sometimes referred to as "effects" and in *S v Mharapara*, the court observed that the determining factor was the "place of impact, or intended impact, of the crime".

Leribe could exercise jurisdiction on the basis of passive personality. In *United States v Yunis*, a US court relied on the principle of passive personality to exercise jurisdiction over a Lebanese national who had hijacked an aircraft with US nationals onboard.

Mauritius: Territoriality: A state has jurisdiction over all criminal acts occurring in its territory and over all persons committing such acts. All crimes committed within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens.

QUESTION 4

Discussion of the case

South African legal experts lined up to condemn the granting of immunity - citing the *Diplomatic Immunities and Privileges Act* (Diplomatic Immunities Act) which, under the circumstances, precludes immunity for the First Lady. Little has been said, however, of whether international law considerations would yield a different result. The South African Constitution requires that recourse be had to international law when interpreting the Bill of Rights. Further, the Constitution stipulates that when interpreting legislation, the spirit, purport and objects of the Bill of Rights must be promoted. This is the basis upon which it is necessary to consider international law on the question of whether Mrs Mugabe is entitled to immunity.

It must be stated at the outset that diplomatic immunity in international law has come to

be one of the most abused doctrines, often invoked when States seek to avoid the embarrassment of misbehaving diplomats. At its core, diplomatic immunity is envisaged to allow individuals to accomplish the competent functions of their office - meaning that heads of State and diplomats should be free to conduct their work in foreign States, free from the threat of arrest. The *Vienna Convention on Diplomatic Relations of 1961* (Vienna Convention), of which South African has signed and ratified, is the key international instrument governing diplomatic immunity. For the present purposes, its most salient provision is the granting of complete immunity from criminal sanction, while civil sanction may be permitted in a few narrowly prescribed circumstances. Linked to this provision is the granting of immunities to family members of such diplomats or agents. Suffice to say, the Zimbabwean President is not a diplomatic agent to South Africa, and on that basis, Mrs Mugabe could not qualify for familial immunity as anticipated by the Vienna Convention.

The next consideration thereafter is customary international law. Customary international law refers to the evidence of a generally practiced norm, which has come to be accepted as law. This includes "*opinio juris*" or opinions of law which are settled and uncontroversial practices by nation States. The International Law Commission has opined that diplomatic immunity for assault under customary international law would arise in instances of self-defence but only while the act giving rise to the assault exists. It is noteworthy that media reports have quoted Mrs Mugabe as saying she acted in self-defence - the presence of her bodyguards notwithstanding.

The United Nations Secretariat 2008 Memorandum regarding *Immunity of State Officials from Foreign Criminal Jurisdiction* (the Memorandum) includes immunities, both in private and/or official capacity. This immunity is recognised specifically for heads of State, as holders of their State's highest office. The Memorandum recognises that there is no State practice concerning the granting of immunity to the family members of heads of State, but recommends that family members too be granted immunity.

1) Foreign heads of state and general immunity

Under the principle of immunity, international law will prohibit a state from exercising jurisdiction over a matter that would ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved (for example, a head of state) or the nature of the conduct in question.

Immunities spring from two distinct, yet related, concerns of international law:

i. the need to 'ensure the smooth conduct of international relations', which requires that 'states are able to negotiate with each other freely and that those state agents charged with the conduct of such activities should be able to perform their functions without harassment by other states'
ii. the principle of state sovereignty, in terms of which all states are equals and no state may exercise jurisdiction over another state's conduct. Immunities of this sort (functional immunities) emerged with the modern, territorially bound states. They provide that a court may not exert jurisdiction over the sovereign or his or her property when he or she is in your territory as this is regarded as an affront to sovereignty.

Article 4(1) of the Diplomatic Privileges and Immunities Act provides that a head of state is immune from the criminal and civil jurisdiction of the court of the Republic, and enjoys such privileges as Heads of state enjoy in accordance with the rules of customary international law are provided for in the agreement entered into with a state or government where immunities and privileges are conferred upon such a head of state may be conferred on such a head of state by virtue of section 7(2).

2) Immunity and international crimes

The rise of international criminal law in the past half-century has resulted in a scaling back of the immunity from criminal jurisdiction usually enjoyed by high-ranking officials and those acting on behalf of a state.

i. <u>Functional immunity and international crimes</u>

It is widely accepted that functional immunity does not apply to international crimes, whether prosecuted by international or domestic courts. Such immunity does not apply to 'acts condemned as criminal by international law'. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment'. Similarly, a number of domestic courts have held functional immunity to be inapplicable to the prosecution of international crimes.

The most famous decision is the ***Pinochet case*** where, albeit for different reasons, the UK House of Lords found that General Pinochet could not rely on functional immunity in order to avoid being extradited to Spain to face allegations of torture. The court found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity only for acts performed in the "exercise of his functions as head of state"

In the ***Ghaddafi case***, it was claimed that the Libyan government was involved in the bombing of a U-T-A aircraft which caused the death of the passengers and crew members. A complaint was filed against Ghaddaffi, the Libyan leader. The court however, accepted the plea of immunity and declined jurisdiction.

There is growing international pressure for heads of state to be liable for their actions. A head of state remains subject to private law that protects creditors and other individuals. A head of state also has no immunity regarding the misappropriation of his own state's assets.

ii. Personal Immunity and international crimes

The relevance of personal (diplomatic) immunity in the prosecution of international crimes is more complex. Here, there is a divide between proceedings before international tribunals and those before domestic courts.

- In international courts, the generally accepted view is that such immunities do not apply before international tribunals, although the question is somewhat complicated in the case of the International Criminal Court (ICC).
- there is considerable authority for the proposition that personal immunity continues to apply in domestic courts regardless of the nature of the crime in question.

Most clearly (and authoritatively), in the *Arrest Warrant case*, the ICJ held that Belgium had 'failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law' when it issued an arrest warrant for him for crimes against humanity and war crimes.

With growing international pressure for heads of state to be liable for their actions, a recent resolution adopted by the Institute of International Law provides guidance. At the moment the provisions of the resolution can only be classified as non-binding "soft law". The main provisions of the resolution provide the following:

- For the period in which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
- A former head of state enjoys immunity solely in respect of acts which are performed in the exercise of official functions.
- It is expressly stated that they may be prosecuted for acts constituting a crime under international law, or misappropriation of the state's assets or resources.

3) Spouses for foreign heads of states and immunity

A foreign state can of course grant immunity. But there is a legal framework that governs this. In this case as the spouse of a foreign head of state she could be granted immunity from both civil and criminal jurisdiction of the courts of South Africa if for instance she was on a visit as an envoy of her country or she was accompanying her husband on an official visit. The Constitution explicitly states that "*customary*

international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament". In this instance, the fact that Mrs Mugabe may have immunity at customary international law needs to be juxtaposed against the Diplomatic Immunities Act. Diplomatic immunity from criminal and any civil liabilities is enabled by the Diplomatic Immunities Act but it only applies in certain narrow and specified circumstances.

It is only afforded to the head of a State or a special envoy or representative from another state or organisations. Representatives of the State who are participating in an international conference can also receive immunity for the duration of the stay or meeting. However, the agreement or decision to grant immunity must be published in the Government Gazette. DIRCO granted immunity to Mrs Mugabe, although the legality of granting the immunity, post the event is debatable and possibly constitutes an abuse of the doctrine of diplomatic immunity.

It is apparent that the Diplomatic Immunities Act, in line with the Constitution, takes precedence over customary international law. On this basis, there is no ground for Mrs Mugabe to receive any kind of immunity for the alleged assault.

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QUESTION 1

a) International law

In broad terms, international law is the law between states (countries). In other words, international law regulates the external relations between states. International law also involves relationships between states and international organisations as secondary subjects of international law and also a relationship between international organisations inter se.

b) Reasons why modern international law is presented as European creation

Modern international law presents international law as an idea that mainly originates from Europe. There is no reference to pre-colonial Africa and Asia's involvement and contributions to international law. According to modern international law, the history of international law can be divided into 4 periods:

1500-1648

This epoch was characterised by Portuguese expansion into Africa, India and the East Indies. They aimed to establish a monopoly over trade around the African coast and in the Indian Ocean. Their expansion was facilitated by their circumnavigations of Africa. This was achieved gradually over roughly a hundred years through force. Slaves were abducted from Africa to render free labour. They inevitably found new 'business' partners in Portugal and Spain. Other European countries followed take part in this practice. Consequently, the need for public international law arose, so they could amicably rob Africa of its raw materials, kidnap able young and able-bodied Africans through the Atlantic to Europe.

1648-1815

This period saw the emergence of the Westphalian model. This is an international order consisting exclusively of independent sovereign states. These states exercised untrammeled authority within their respective territories and freely coordinated their mutual relations in accordance with their perceived self-interest on the basis of

equality.

1815-1914

This period was among other things known for the Berlin Conference of 1884, called by Bismarck at the request of Portugal for managing relations among increasingly colonial powers in Africa. This laid a legal foundation for colonialism. Of the 14 countries attending the conference, Great Britain, Portugal, France and Germany 65 were already in control of certain coastal areas. The conference was about agreement on the rules that would determine the further acquisition of territory in Africa, which was deliberated without the participation of African representatives. International agreements and treaties were fixed after the Berlin Conference.

In 1885 a recognised subject of international law could occupy Africa as *terra nullius* the colonial power to gain control over the territory and establish an effective administration, as was required by the Berlin Act. The inhabitants had to sign away their rights and control thereof. It is claimed that, since the African signatories were not real subjects in international law the treaties concluded with African rulers were not real treaties in international law and therefore not enforceable in international law. In the understanding of the court, the treaties assumed the nature of treaties in international law with the result that non-observance of a treaty would amount to a breach of the treaty in international law

Post-World Wars 1 and 2

Note should be taken of two other historical events shortly before the outbreak of World War I. The Hague International Peace Conferences of 1899 and 1907. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict. The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns, but had no mitigating effect on Britain's scorched earth policy and the use of concentration camps in its war against the Boer Republics in South Africa (1899–1902). Nor could it prevent

the outbreak of World War I.

During World war I the peaceful settlement of disputes received considerable attention in articles 12, 13 and 15 of the League of Nations, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.

The rise of international organisations

International organisations have become key actors in international society over the past two centuries, and are now considered subjects of international law in their own right. There is hardly a human activity which is not, to some extent, governed by the work of an international organisation. The establishment and proliferation of international organisations is generally attributed to the changing nature of international society, which has seen a marked increase in the degree of interactions between states, as well as the complexity of issues involved. In such circumstances, the traditional bilateral and ad hoc relations between states are said to have become outmoded, presenting a need to devise new forms and institutions of organisation. These developments form part of a progressive narrative charting the ongoing transformation of international law itself, from a law of coexistence to co-operation (and perhaps, community).

These periods refer to European scholars, European states and ideas as the foundation of the theories and practice of international law. These include ideas such as state sovereignty, states as subject of international law, diplomatic immunity, and international organisations

c) **African customary law shaped the practice of international law in pre-colonial Africa** (Robert Smith – Peace and Palaver)

Elias and Smith, these authors clearly explored the extent to which pre-colonial African Kingdoms (Benin, Kongo, Oyo, Mossi etc.) engaged in what is today referred to as international law and relations. These Kingdoms dealt with European powers on equal footing, and negotiated trade and diplomatic matters in a sophisticated fashion.

Despite the unwritten nature of law in Africa, and of many of the historical sources, there is abundant evidence of formal relations at the highest governmental levels between the different peoples of West Africa in the pre-colonial period, and there is even some evidence of the existence of an inter-states system. (Smith 599–621).

It must be emphasised that the diplomatic interactions between African Kingdoms and European powers was mainly regulated by the principles of African customary law. For example, oaths and medicines were taken by parties in order to ensure the sanctity of contracts and treaties. The diplomatic immunity of accorded to representatives were based on customary rules of respect, care and hospitality. The Kingdoms of Benin and Kongo, exchanged ambassadors with Portugal.

Slavery and colonialism contributed significantly to the relegation of African contribution to international law. Many of the principles that today guide diplomatic interaction, issues such as diplomatic immunity etc. were also applied during this period, such as the appointment of ambassadors, diplomatic immunity, the principle of sovereignty and territorial sovereignty, and principles of trade. Diplomats were appointed from the rank of nobles, and even slaves in some cases. These diplomats carried credentials such as fan, staff, cane or wore special clothing to signify their rank. There were breaches of diplomatic rules in some cases.

The capacity to engage in foreign affairs usually vested in the King. Although in the Oyo Empire, the King may consult with the council of chiefs. Here, students have to

show examples on how well they have grasped the topic.

In large areas of Africa there had emerged broadly similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law, this customary law shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty.[16] Thus it seems that customary law in unity in diversity, provided a bond between the different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.[17]

Treaties in West Africa were entered into solemnly and were usually regarded as binding and sacred. African customary law shares with customary international law acceptance of the principle *pacta servanda sunt* as basis for assurance of a valid world order.[18] Neither on the coast nor in the savannah nor even in the deepest forest did these peoples live in isolation from each other. It may show that these relations were generally conducted according to an indigenous system and in obedience to a customary law, both of which were widely accepted, comparable in many ways to what obtained in western Europe and elsewhere, and capable of assimilating without being essentially changed by external influence.[19]

The similarities of the West African to the West European system, especially as the latter was before the emergence of the nation state and of permanent diplomacy about the time of the Renaissance, are striking. Ambassadors were despatched to represent their sovereigns abroad; their work, although it had its hazards, was within the protection of the law; treaties were concluded and solemn sanctions provided to uphold them since, in Africa as in Europe, 'treaties are made to be kept'.[20]

16 Elias T 'Sovereignty within the Law' 1965 *New York* 210-22.
17 Smith 1971 *JSTOR* 599–621.
18 Elias1965 *New York* I965 210-22.
19 Smith 1971 *JSTOR* 599–621.
20 Smith 1971 *JSTOR* 599–621.

QUESTION 2

a) Grounds of intervention under Article 4(h) of the African Union Constitutive Act

Article 4(h) of the Constitutive Act of the African Union (2000) provides as follows: The Union shall function in accordance with the following principles: the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

The AU can intervene in respect of grave circumstances such as war crimes, genocide and crimes against humanity. This was motivated in large part by dissatisfaction with the current international legal regime, which had failed to prevent atrocities in Africa during the 1990s.

War crimes include killing of protected persons; mistreatments committed against any persons such as torture, mutilation, sexual violence, attacks on buildings dedicated to religion, education, art and science and historical monuments.

Crimes against humanity include widespread attack against civilian population such as murder, enslavement, enforced disappearance of persons, deportation and forcible transfer of population.

Genocide includes killing members of a particular group, causing bodily harm to members of a group, physical destruction of a group.

b) AU's intervention requires Security Council's authorization

The UN generally prohibits the use of force. There are exceptions under article 51 of the UN Charter (individual or collective self-defence if an armed attack occurs against a member state). Such action must be authorised by the Security Council under Chapter VII. Article 53 of the Charter notes that regional organisations or agencies must first obtain authorisation of the Security Council before undertaking enforcement

actions.

However, if the intervention takes place by invitation – that is, consent, of the member state – the need to seek prior Security Council authorisation falls away, since the invitation itself will constitute sufficient justification for the intervention. However, in such circumstances, the invitation must come from a government whose status and legal authority to seek assistance are not in dispute and the consent itself is clear and unambiguous.

Note also that consent as a justification for intervention cannot be relied upon if the action taken is directed against the government itself. For instance, this will be the case where the actions of the government of the territorial state are the cause of the humanitarian crisis and the AU is forced to act against that government under article 4(h) of the AU's Constitutive Act.

A related issue is whether member states of the AU's Constitutive Act, by virtue of their membership, have given advance consent for the kind of action contemplated in article 4(h). There are two possible responses to such an interpretation. The one is that the lawfulness and validity of an invitation (consent) (to which the AU has a right to respond) can only be determined at the time and in the circumstances of the crisis; advance consent to intervene in article 4(h) crises sometime in the future makes such an assessment impossible and disregards the sovereign right of the territorial state to determine for itself the cause of action in the actual circumstances of the situation. The other is that the AU may then rely on advance consent to exempt itself from seeking and obtaining prior Security Council authorisation for enforcement action under article 4(h).

This is certainly not commensurate with the overall purpose of the UN Charter's legal regime on the use of force – in particular, that of article 53. In general, the powers and functions of the AU, especially those under article 4(h) of the AU's Constitutive Act, cannot be interpreted with disregard for article 103 of the UN Charter. This provision

states: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 4(h) can be seen as advance consent given by member states but it can be argued that since the AU has committed itself to international law, it still has to get authorisation before intervention. In conclusion, the AU has to get authorisation from the UN before intervening in Burundi

c) Legal significance of AU's intervention in Burundi

The commitment to its principles obligates the AU to intervene on the grounds of Responsibility to Protect in order to protect civilians. There is an obligation on the part of the AU to intervene based on Article 4(h), especially on the grounds on crimes against humanity, which was highlighted in the report by the African Commission. The AU should approach the UNSC to get an authorisation to act in this regard.

QUESTION 3

Jurisdiction

The different jurisdictional links:

a) The principle of territoriality. The state on whose territory the offending conduct took place has jurisdiction over that particular matter.
b) The principle of nationality/active personality. The court of a particular state will exercise jurisdiction over a matter where the perpetrator is its national; even when the offence took place abroad.
c) The principle of passive personality. The nationality of the victim is central in this case. Here the court of a state will exercise jurisdiction over a matter because the victim of the offending conduct is a national of that particular state; even where the offence took place abroad.
d) The protective principle. Here the protection of an interest of that particular state will clothe the national court with jurisdiction.

e) The effects principle. A state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.
f) The principle of universality (universal jurisdiction). Here the state that eventually prosecutes the offender has not causal link with the crime or the accused (or even the victim), save that the nature of the acts complained of is so egregious that it is an affront to all of humanity, and the state proceeds with prosecution as an agent of humankind. The Perpetrator is regarded as an enemy of humankind as a whole. Prosecution of the crime is open to any state.

Application to the facts

Comoros:

- Agrizzi is passing through Comoros. Comoros can claim jurisdiction over the possession of cannabis. This will be territorial jurisdiction.
- Comoros has no other connecting link to either the crime or the victims. However, Comoros might be able to claim universal jurisdiction over Agrizzi in relation to one crime, that of kidnap of school girls to use as sex slaves. If the violence is characterised as a non-international armed conflict (NIAC) (the so called civil war), then the crime committed would be a war crime. If, however, the violence does not meet the threshold of NIAC, then the offending conduct would be classified as a crime against humanity. In either of these cases, the crime committed would fall within the class of crimes for which any state as an agent of all humankind can exercise universal jurisdiction.

Republic of Qwaqwa:

- Territoriality – the crimes of abduction of school girls for use as sex slaves occurred on the territory of Qwaqwa. So did the crime of bombing the embassy which killed 44 people; and the launch of the rockets that pummelled the state of Yoyika. All these are connecting factors that entitle the state of Qwaqwa to claim territorial jurisdiction over Agrizzi.

- Passive personality – the sex slaves are nationals of Qwaqwa, therefore the state can claim jurisdiction on this extra ground, even though the kidnapper and his rebel collaborators are foreigners from neighbouring Yoyika.

Republic of Yoyika:

- Nationality – Agrizzi is a national of Yoyika, therefore the Republic of Yoyika can claim jurisdiction on the basis of nationality for the crimes of launching rockets to bomb targets inside Yoyika (even though the act itself was commenced externally); for the drug farm and drug production; for the bombing of its embassy; and for laundering money through its banking system.
- Passive personality – Some of the victims of Agrizzi's crimes are nationals of Yoyika. Therefore, the state of Yoyika can claim jurisdiction over the crimes of rocket bombing of their property which killed Yoyika nationals.
- Territoriality – for the drug farms and drug production; and for the laundering of the proceeds of drug peddling that took place on Yoyika territory.

Republic of Matafeni:

- Passive personality – the rocket shelling, although it commenced in the Republic of Qwaqwa and terminated in the Republic of Yoyika, it managed to kill nationals of Matafeni as well. That nationality link (passive personality) would bestow jurisdiction upon the Gondwana of Matafeni.

Republic of Gondwana:

- Effects principle - The drug farms produce opioids which are exported using a drug route that goes through Gondwana. This invokes the ground of jurisdiction known as the effects principle. Even though the opioids are produced outside Gondwana, their impact is felt in the economy and social fabric of the Republic of Gondwana. It can therefore claim jurisdiction based on that link.

Islamic State of the East:

- Effects principle – in similar fashion to the jurisdiction enjoyed by the Republic of Gondwana.

QUESTION 4

a) Sources of international law

The traditional sources of international law are highlighted in article 38 of the Statute of the International Court of Justice. This article provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The general practice seems to be that there is no strict hierarchy when it comes to the sources. However, the “subsidiary means” on (d) suggests that the other sources are secondary to the first two mentioned, treaty and custom.

The traditional sources are therefore:

i. Treaties;
ii. Customary international law;
iii. General principles of law;
iv. Judicial decisions and the teachings of publicists.

b) True/False

1) F
2) F
3) F

4) F
5) F
6) F
7) F
8) F
9) T
10) T
11) F
12) T
13) T
14) F
15) T

LCP4801 EXAM PACK

OCT / NOV 2021

QUESTION 1

Write short notes on the following:

a) The differences and similarities between international law and national law (10)

Differences

International law	**National law**
There is no legislator in international law. Example: The UN does not have the power to enact rules which are binding on all states. The General Assembly (GA) may only adopt resolutions, and these are merely recommendations – states cannot be compelled to apply them. In the UN, the representatives of states are not elected to the GA, but are appointed by their respective states.	**Complete legislative process, parliament**. A parliament (as an instrument of national law), on the other hand, makes laws which are fully binding on the community it represents. In a democratic parliament the members are elected by the citizens of that specific state.
Has a judiciary but:	Fully developed judiciary
• There is no precedent system • The state is a judge in its own case Article 59 of the Statute of the International Court of Justice (ICJ) provides that the "decision of the Court has no binding force except between the parties and in respect of that particular case". The state itself decides whether there has been an infringement of international law, judges the matter itself, and takes whatever steps it decides on. States are also closely involved in the process of appointing the panel (the judges) that will hear their case.	• Precedent system applies • Nemo iudex in sua causa Under the precedent system, lower courts are bound by the decisions of higher courts. This is the position under most, if not all, national law systems. The legal principle nemo iudex in sua causa applies which literally means that no-one should be a judge in his own case. The plaintiff s or accused have no say in who will hear their cases – there is a permanent body of judges, magistrates, etcetera, who hear all cases.

There is no executive to enforce judgements – sanctions are poorly developed. There is no central executive authority with a police force at its disposal to enforce judgments	There is a complete executive machinery in order to enforce judgments. Municipal judgments are supported by the complete executive machinery of the state in the form of a police force, the military etc.
The subjects of international law are generally states or international organisations	The subjects of national law are individuals or legal persons

Similarities

International law	**National law**
Comprises accepted norms prescribing	Comprises accepted norms prescribing
state behaviour	behaviour
Uses writings, etc. of jurists rather than morality	Writings of jurists and precedent are freely used
Can consciously be altered by treaty	Can consciously be altered by statute/ legislation

b) Instances where a treaty may be terminated or suspended (10)

1. Fulfilment of obligation

   Treaties concluded to serve a specific purpose will terminate once the object of the treaty has been fulfilled. For example, after post-election riots in Kenya in 2007.there was a food shortage.SA and Kenya concluded a treaty for the delivery of maize. Once the maize has been delivered, the object of the treaty had been fulfilled and the treaty may terminate.

2. Treaty provision
3. Consent
4. Conclusion of a new treaty
5. Impossibility of performance
6. Breach of treaty
7. War and suspension of diplomatic/consular relations
8. Ius cogens
9. Unilateral repudiation
10. Rebus sic stantibus

c) The distinction between indirect and direct state liability (10)

i. Direct liability

A state is directly liable when it (obviously acting through its agents) violates an international law obligation it owes to another state. This may be, for example, by violating the territorial sovereignty of another state (seizing a person in the foreign state without permission); damaging its property (shooting down a foreign state‟s aircraft); or injuring its diplomats (holding them hostage, torturing them, etcetera).[1]

In the Tehran Hostages,[2] the US Embassy in Tehran was attacked by a group of militant protesters who subsequently took possession of the embassy and held embassy staff hostage for a considerable period of time. During their violent action, the militants encountered no opposition from the Iranian security forces responsible for the protection of the embassy premises. In fact, the security personnel simply disappeared from the scene.

In terms of general international law, a receiving state is under an obligation to protect the premises, staff and archives of the sending state‟s diplomatic and consular agencies. Therefore, the ICJ ruled that the inaction by Iran constituted clear and serious breaches of its obligations in this regard and for that it must be held directly responsible for such breaches.

ii. Indirect liability:

A state will be found to be indirectly liable, if the state injures the person or property of a foreign national within its territory; or the state does not itself act in the positive sense, but fails to prevent the harmful act, or fails to minimise the harm done to the "victim".[3]

There is no difference in the result of direct or indirect liability: If a state is liable, it must remedy its wrong. The difference, however, lies in the fact that before a state may assert a claim for one of its nationals as a result of injury in another state, that national must first exhaust available local remedies. In the case of direct liability, the state need not exhaust local remedies.

d) The bases of jurisdiction under international law (10) [40]

QUESTION 2

The United Nations General Assembly recently passed a resolution changing the status of Quarantina from an "observer entity" to a "non-member observer state" within the United Nations (UN) system. Northbound Phillips, the Permanent Representative of Laskonia to the UN had told the Assembly: "This resolution does not establish that Quarantina is a state." You have been tasked by the representative of Quarantina to the UN, Farah Amazonia, to write a legal opinion on whether or not this resolution makes Quarantina an independent state in light of the requirements for statehood in international law. [40]

QUESTION 3

"The existence of a widespread customary law was noticed by early European visitors to Africa, in particular by the Portuguese. Traders enjoyed, for example, the protection of law for the unwritten contracts, based on oaths and 'medicine', which they made with the local inhabitants. Conversely, these European traders resented the application of West African law under which the property of a dead colleague, or their ships gone aground along the coast, were forfeit to the local ruler. Thus it seems that customary law, this 'unity in diversity', provided a bond between the different states

1 Strydom, International Law 142.
2 US Diplomatic and Consular Staff in Tehran (US v Iran) ICJ Reports 1980 3.
3 Strydom, International Law 142.

and peoples of West Africa, and a form of international law by which their relations with each other could be regulated."

- Robert Smith, 'Peace and palaver: International relations in pre-colonial West Africa' Journal of African History (1973).

Based on the quote above, explain how African customary law shaped the following practises in pre-colonial Africa:

a) The appointment of ambassadors (5)

b) The immunity for the persons and possessions of diplomats (7)

c) Agreement on peace treaties (8) [20]

MAY / JUNE 2021

QUESTION 1

The primary task of the United Nations (UN) is the maintenance of international peace and security. Its founding instrument, the UN Charter, prohibits the use of force in the settlement of international disputes. This it does in article 2(4) of the UN Charter, whilst article 2(3) of the Charter places an obligation on UN member states to settle their disputes through peaceful means with due regard for international peace and security, as well as justice. There are four such methods that states could rely upon to settle their disputes, apart from judicial settlement and the use of force. Write an essay in which you discuss these four methods of peaceful settlement of international disputes between states. [40]

Methods of peaceful settlement of international disputes:

i. Negotiation

Negotiation as a form of dispute settlement is especially attractive because the settlement remains within the control of the parties and they can approach the matter without being constrained by any predetermined or uniform procedural rules within which the dispute must be settled. The parties control the pace, the methods and the nature of their interaction.[4]

The ICJ has emphasised that the parties „must negotiate with the aim of arriving at an agreement, and not merely go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement." Negotiations must be a genuine attempt to engage in discussions.[5]

However, this does not mean that the negotiations must necessarily lead to a settlement.

ii. Mediation

4 Strydom H, *International Law* (edn Oxford University Press 2016) 184.
5 Strydom, *International Law* 184.

In this instance, the states are assisted through the intervention of a third party (the mediator). The mediator is actively involved in conveying each party‟s proposals and ideas, and looking for a solution to the problem. In the end, the success of mediation will depend on whether the mediator can devise or promote a solution that both parties are prepared to accept.[6] ———————————

Mediation is also known as „good offices. which simply means that the services of some entity or person are placed at the disposal of the disputing parties with a view to solving the dispute. For instance, the good offices of the UN Secretary- General may be called upon to solve a dispute between states and this may coincide with a request for mediation.

In article 4 of the 1899 Convention for the Pacific Settlement of Disputes the role and function of the mediator is spelled out as „*reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the parties …*‟. This provision makes it clear that the mediator plays the role of facilitator and cannot impose results on the parties.

iii. Conciliation

Article 1 of the Regulations on the Procedure of International Conciliation defines it as a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either in a permanent or ad hoc basis to deal with a dispute proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties with a view to its settlement, such aid as they may have requested.[7]

In this instance, a commission set up for that purpose, either permanently or an ad hoc basis, and it assists the parties to the dispute. This is a formalised form of mediation and it is usually decided upon through a bilateral arrangement.

Conciliation may be decided upon by states through a bilateral arrangement that is encoded in a treaty. The treaties that establish conciliation commissions usually state what the precise role of the commission is going to be. Conciliation commissions do not have to apply the rule of law but nothing prevents them from doing so. The outcome of the conciliation is not binding on parties.[8]

iv. Arbitration

Arbitration has been defined by the International Law Commission as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.

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6 Strydom, *International Law* 184-185.
7 Strydom, *International Law* 185.
8 Strydom, *International Law* 185.

The Permanent Court of Arbitration is a body which came into existence in terms of The Hague Conventions for the Pacific Settlement of International Disputes (1899 and 1907). Its function was to establish a body of eminent jurists (listed by various state parties to the convention) from which states could select arbitrators to settle their disputes. It continues today for state parties and obviously depends on the willingness and consent of state parties to the Convention to submit to arbitration.

Parties must agree on:

- The identity of the arbitrators
- The content of the legal question(s)
- What rules of law would apply to the dispute (they are not necessarily rules of public international law)
- The time frame within which the award must be made That the award will be final and binding.

QUESTION 2

Write short notes on each of the following topics:

(a) The different forms of jurisdiction that a court could rely on under international law (10)

The principle of territoriality

In terms of the principle of territoriality all crimes committed or alleged to have been committed within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens. This principle is „universally recognized", and, as a matter of practice, states routinely assert jurisdiction over criminal acts that occur within their territory and over the persons responsible for such acts.

ii. The nationality principle

In terms of the nationality principle, a state may choose to exercise jurisdiction over crimes committed abroad when they are commited by nationals of that state. The link or connecting factor between the state and the conduct in question is the nationality of the perpetrator.

iii. Passive personality

In terms of the passive personality principle, a state may choose to exercise jurisdiction over extraterritorial crimes committed, or intended to be committed, against their nationals (and in some instances their ordinary residents). Here, the link between the state and the conduct in question is the nationality of the victim of the crime in question. This principle is in a sense the „reverse of the coin" of the nationality principle. In the Arrest Warrant case it was held that passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

iv. The protective principle

A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.

v. The effects principle

In terms of this principle, a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.

vi. Universal jurisdiction

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

(b) The distinction between direct and indirect state liability (10)

iii. Direct liability

A state is directly liable when it (obviously acting through its agents) violates an international law obligation it owes to another state. This may be, for example, by violating the territorial sovereignty of another state (seizing a person in the foreign state without permission); damaging its property (shooting down a foreign state‟s aircraft); or injuring its diplomats (holding them hostage, torturing them, etcetera).[9]

In the Tehran Hostages,[10] the US Embassy in Tehran was attacked by a group of militant protesters who subsequently took possession of the embassy and held embassy staff hostage for a considerable period of time. During their violent action, the militants encountered no opposition from the Iranian security forces responsible for the protection of the embassy premises. In fact, the security personnel simply disappeared from the scene.

In terms of general international law, a receiving state is under an obligation to protect the premises, staff and archives of the sending state‟s diplomatic and consular agencies. Therefore, the ICJ ruled that the inaction by Iran constituted clear and serious breaches of its obligations in this regard and for that it must be held directly responsible for such breaches.

iv. Indirect liability:

A state will be found to be indirectly liable, if the state injures the person or property of a foreign national within its territory; or the state does not itself act in the positive sense, but fails to prevent the harmful act, or fails to minimise the harm done to the “victim”.[11]

There is no difference in the result of direct or indirect liability: If a state is liable, it must remedy its wrong. The difference, however, lies in the fact that before a state may assert a claim for one of its nationals as a result of injury in another state, that national must first exhaust available local remedies. In the case of direct liability, the state need not exhaust local remedies.

(c) The grounds for the invalidation of treaties (10)

Article 53 of the VCLT provides that any treaty inconsistent with a peremptory norm will be void. Jus congens norm is a peremptory norm of general international law, that is, a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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9 Strydom, International Law 142.
10 US Diplomatic and Consular Staff in Tehran (US v Iran) ICJ Reports 1980 3.
11 Strydom, International Law 142.

Vienna Convention on the Law of Treaties (VCLT) gives the following grounds of treaty invalidation:

Article 48: Error	**Article 49: Fraud**	**Article 50: Corruption**	**Article 51: Coercion**	**Article 52: Threat/use of force**
A state may invoke error if it assumed a fact or situation which was material and formed the basis of consent when the treaty was	A state may invoke fraud if it was induced by fraudulent action of other negotiating states to conclude the treaty.	A state may invoke corruption if there was direct or indirect corruption of the state‟s representative by another	A state may invoke coercion where there was coercion of a representative by acts or threats against the representative	A state may invoke force if there was coercion of a state by threat or use of force contrary to the principles of international law in the UN
concluded and it did not itself contribute to the error; or the circumstances were not suspicious.		negotiating state.	by any person.	Charter.

(d) The differences and similarities between international law and national law (10) [40]

Differences

International law	**National law**
There is no legislator in international law. Example: The UN does not have the power to enact rules which are binding on all states. The General Assembly (GA) may only adopt resolutions, and these are merely recommendations – states cannot be compelled to apply them. In the UN, the representatives of states are not elected to the GA, but are appointed by their respective	**Complete legislative process, parliament**. A parliament (as an instrument of national law), on the other hand, makes laws which are fully binding on the community it represents. In a democratic parliament the members are elected by the citizens of that specific state.

states.	
Has a judiciary but:	Fully developed judiciary
• There is no precedent system • The state is a judge in its own case Article 59 of the Statute of the International Court of Justice (ICJ) provides that the "decision of the Court has no binding force except between the parties and in respect of that particular case". The state itself decides whether there has been an infringement of international law, judges the matter itself, and takes whatever steps it decides on. States are also closely involved in the process of appointing the panel (the judges) that will hear their case.	• Precedent system applies • Nemo iudex in sua causa Under the precedent system, lower courts are bound by the decisions of higher courts. This is the position under most, if not all, national law systems. The legal principle nemo iudex in sua causa applies which literally means that no-one should be a judge in his own case. The plaintiff s or accused have no say in who will hear their cases – there is a permanent body of judges, magistrates, etcetera, who hear all cases.
There is no executive to enforce judgements – sanctions are poorly developed. There is no central executive authority with a police force at its disposal to enforce judgments	There is a complete executive machinery in order to enforce judgments. Municipal judgments are supported by the complete executive machinery of the state in the form of a police force, the military etc.
The subjects of international law are generally states or international organisations	The subjects of national law are individuals or legal persons

Similarities

International law	**National law**
Comprises accepted norms prescribing	Comprises accepted norms prescribing
state behaviour	behaviour
Uses writings, etc. of jurists rather than morality	Writings of jurists and precedent are freely used
Can consciously be altered by treaty	Can consciously be altered by statute/ legislation

QUESTION 3

Temba is an artist from Pretoria who concludes an agreement with the Government of Goldava. The agreement stipulates that he will paint a portrait of the wife of the Goldavian Ambassador to South Africa (Mrs Nip). This painting is to be hung on the wall of the Ambassador's office. Temba will in turn be paid R10 000.00 deposit before he starts working and R25 000.00 when his work is completed. He receives the deposit in good time. A month later the portrait is finished, and he shows it to Mrs Nip at the embassy. Mrs Nip is not satisfied with the way in which she has been depicted by Temba. Temba quietly insists that the portrait is life-like as requested by the Government of Goldava. Mrs Nip loses her temper and throws a paper weight at Temba. Temba is seriously injured and taken to hospital. When his condition improves he approaches you for legal advice. With reference to authority, advise Temba on the following points:

a) **whether Mrs Nip can be arrested and charged with assault; (6)**

In a number of states today, states‟ civil immunity only applies in respect of their public acts. However, their commercial acts are no longer beyond the jurisdiction of domestic courts. In South Africa, the restrictive approach to state immunity was given effect in the 1981 Foreign States Immunities Act[12] which, having recognised the general immunity of foreign states, sets out a number of instances where civil immunity will not apply. These include amongst other things claims for personal injuries and damage to property caused in the Republic.[13]

Generally, Mrs. Nip enjoys diplomatic immunity as a member of the diplomat‟s family but because the issue involves professional or commercial activities outside of official functions and a claim for personal injuries, Mrs. Nip will be arrested for throwing a paper weight at Temba and causing him serious injuries.

b) **whether the embassy premises can be searched for the paper weight which was allegedly used in the assault, (8)**

In terms of the Vienna Convention on Diplomatic Relations 1961,[14] a foreign mission is entitled to protection by the receiving state, once established. In this instance, the receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against intrusion or damage, and to prevent disturbance of the peace of the mission, or an impairment of the mission‟s dignity.[15]

Agents of the receiving state are not entitled to enter the premises of the mission without the consent of the head of the mission and the premises, the property thereon and the mission‟s means of transport are immune from search, requisition, attachment or execution.[16]

The archives, documents, official correspondence and the diplomatic bag of a foreign mission, wherever they may be, are also inviolable and the receiving state must permit free communication on the part of the mission for all official purposes.[17] However, given past

12 Foreign States Immunities Act 87 of 1981.
13 Foreign States Immunities Act s 6.
14 Vienna Convention on Diplomatic Relations 1961.
15 Vienna Convention on Diplomatic Relations 1961, Article 41.
16 Vienna Convention on Diplomatic Relations, Article 22.
17 Vienna Convention on Diplomatic Relations, Article 24 & 27.

incidents of abuse of certain privileges and immunities and the need to find a balance between the rights and duties of the states involved, it is inconceivable that the receiving state, on reasonable grounds of suspicion of abuse, will not be entitled to investigate a matter, especially when national security is at risk or some other grave offence is suspected.

c) **whether Temba can institute an action in a South African court claiming the remaining R25 000.00 from the Goldavian Government (6) [20]**

In a number of states today, states‟ civil immunity only applies in respect of their public acts. However, their commercial acts are no longer beyond the jurisdiction of domestic courts. In South Africa, this restrictive approach to state immunity was given effect to in the 1981 Foreign States Immunities Act[18] which, having recognised the general immunity of foreign states, sets out a number of instances where civil immunity will not apply. These include commercial transactions entered into by the state.[19]

On the given set of facts, the situation would fall under the commercial transaction exception to sovereign immunity. If the restricted immunity theory is applied, the contract will be seen as a normal commercial transaction–in concluding the contract, Goldava was not performing a public governmental function, but was merely acting as a trader in the marketplace. It would, therefore, not succeed in raising immunity and Temba would get his money.

JAN / FEB 2021

QUESTION 1

The major task of the United Nations (UN) is the maintenance of international peace. Its founding instrument, the UN Charter, prohibits the use of force in the settlement of international disputes. This it does in article 2(4), whilst article 2(3) places an obligation on UN member states to settle their disputes through peaceful means with due regard for international peace and security, and justice. There are four such methods that states could rely upon to settle their disputes, apart from the judicial settlement, and the use of force. Write an essay in which you discuss these four methods of peaceful settlement of international disputes between states. [25]

Methods of peaceful settlement of international disputes:

i. Negotiation

Negotiation as a form of dispute settlement is especially attractive because the settlement remains within the control of the parties and they can approach the matter without being constrained by any predetermined or uniform procedural rules within which the dispute must be settled. The parties control the pace, the methods and the nature of their interaction.[20]

The ICJ has emphasised that the parties „must negotiate with the aim of arriving at an agreement, and not merely go through a formal process of negotiation as a sort of prior

18 Foreign States Immunities Act.
19 Foreign States Immunities Act s 4.
20 Strydom H, *International Law* (edn Oxford University Press 2016) 184.

condition for the automatic application of a certain method of delimitation in the absence of agreement." Negotiations must be a genuine attempt to engage in discussions.[21]

However, this does not mean that the negotiations must necessarily lead to a settlement.

ii. Mediation

In this instance, the states are assisted through the intervention of a third party (the mediator). The mediator is actively involved in conveying each party"s proposals and ideas, and looking for a solution to the problem. In the end, the success of mediation will depend on whether the mediator can devise or promote a solution that both parties are prepared to accept.[22] ———————————

Mediation is also known as „good offices. which simply means that the services of some entity or person are placed at the disposal of the disputing parties with a view to solving the dispute. For instance, the good offices of the UN Secretary- General may be called upon to solve a dispute between states and this may coincide with a request for mediation.

In article 4 of the 1899 Convention for the Pacific Settlement of Disputes the role and function of the mediator is spelled out as „*reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the parties …*". This provision makes it clear that the mediator plays the role of facilitator and cannot impose results on the parties.

iii. Conciliation

Article 1 of the Regulations on the Procedure of International Conciliation defines it as a method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either in a permanent or ad hoc basis to deal with a dispute proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties with a view to its settlement, such aid as they may have requested.[23]

In this instance, a commission set up for that purpose, either permanently or an ad hoc basis, and it assists the parties to the dispute. This is a formalised form of mediation and it is usually decided upon through a bilateral arrangement.

Conciliation may be decided upon by states through a bilateral arrangement that is encoded in a treaty. The treaties that establish conciliation commissions usually state what the precise role of the commission is going to be. Conciliation commissions do not have to apply the rule of law but nothing prevents them from doing so. The outcome of the conciliation is not binding on parties.[24]

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21 Strydom, *International Law* 184.
22 Strydom, *International Law* 184-185.
23 Strydom, *International Law* 185.
24 Strydom, *International Law* 185.

iv. Arbitration

Arbitration has been defined by the International Law Commission as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.

The Permanent Court of Arbitration is a body which came into existence in terms of The Hague Conventions for the Pacific Settlement of International Disputes (1899 and 1907). Its function was to establish a body of eminent jurists (listed by various state parties to the convention) from which states could select arbitrators to settle their disputes. It continues today for state parties and obviously depends on the willingness and consent of state parties to the Convention to submit to arbitration.

Parties must agree on:

- The identity of the arbitrators
- The content of the legal question(s)
- What rules of law would apply to the dispute (they are not necessarily rules of public international law)
- The time frame within which the award must be made That the award will be final and binding.

QUESTION 2

Writing in 1909, John Foster extoled Suarez of Spain and Gentilis of Oxford as some of the luminaries of their time, through whose industry and skill international law principles were being churned out in Europe.1 Foster credited the rise of nation states in Europe, and the conclusion of the Peace of Westphalia as the key protagonists in bringing us sovereignty of states, the sanctity of treaties and diplomacy as we know these concepts today. These and other international law concepts subsequently found their way to the global south via the vehicles of colonisation and Christianisation. Fast forward to over a hundred years later, Foster's take on the birth and evolution of international law still prevails in mainstream Eurocentric legal scholarship.

Using Foster's assertions as a point of departure, write an essay in which you critically argue for or against Foster's view. [25]

The evolution of international law has been claimed to be owed to the Western legal players, just as the assertions of John Foster. It is because of this belief that the historical evolution of international law is an integral part of the phenomenon of state formation. This process owed its influence to the conditions that started to prevail towards the end of the 1500s in parts of Europe and which account for what is usually referred to as the Eurocentric nature of „early" international law.

The period from 1500 to 1648 is known for the emergence of modern Europe and was characterised by vigorous economic expansion, followed by social, political and cultural transformations. This period saw the emergence of Westphalian model. This is an international order consisting mainly or exclusively of independent sovereign States which exercised untrammeled authority within their respective territories and freely coordinated their mutual relations in accordance with their perceived self-interest on the basis of equality. It is a model which upholds state sovereignty and its

major role in being a role player in international law. The sovereign equality of states and respect for their independence, ideas that developed between this period are still part of the fundamental principles of international law, and are enshrined in the UN Charter.

The period from 1648 to 1815 is described as the „most important event in modern history", called into being a new form of state referred to as the nation state. What emerged here was the concept of the nation as a political entity that was a voluntary association of a people under a common set of laws and represented by the same government. Connected to this historical notion of state formation were the aspirations of peoples or nations to independent statehood in the political and legal sense of the word. This led to the often interchangeable use of concepts such as „nation" and „state" in international law and in international relations.

The nineteenth century was also the age of the European conferences between the major powers. These contributed significantly to the development of rules governing the waging of war and the settlement of disputes. Through a network of international relations, the application of international law principles expanded and necessitated the academic study of state practice at institutions of higher learning.

The period from 1815 to 1914 saw the emergence of colonialism when African states were regarded as terra nullius. Colonial acquisitions were that while the presence of an indigenous population in these territories could prevent or limit the acquisition of private law rights, it could not prevent occupation of the territory for the purpose of asserting state sovereignty rights. Hence, any inhabited territory that was not the sovereign territory of a state, or a protectorate of a state, could become the object of occupation.

According to this theory, subjects of international law were only those states that exercised all rights of sovereignty and performed state functions in the same way as modern European states did. In Africa, although there were more or less distinct forms of political organisation, these were not sufficient to make it possible to speak of a real state. Therefore, they were not subjects of international law and their territory was ownerless in international law. Any recognised subject of international law could occupy Africa as terra nullius.

Before the outbreak of World War I the Hague International Peace Conferences of 1899 and 1907 played a great role in developing international law. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict. The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns. During World War I the peaceful settlement of disputes received considerable attention in articles 12, 13 and 15 of the League of Nations, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.

Key contributions by Africa to the development

Despite the unwritten nature of law in Africa, and of many of the historical sources, there is abundant evidence of formal relations at the highest governmental levels between the different

peoples of West Africa in the pre-colonial period, and there is even some evidence of the existence of an inter-states system.[25]

The diplomatic interactions between African Kingdoms and European powers were mainly regulated by the principles of African customary law. For example, oaths and medicines were taken by parties in order to ensure the sanctity of contracts and treaties. The diplomatic immunity of accorded to representatives were based on customary rules of respect, care and hospitality. The Kingdoms of Benin and Kongo, exchanged ambassadors with Portugal.

Furthermore, slavery and colonialism contributed significantly to the relegation of African contribution to international law. Many of the principles that today guide diplomatic interaction; issues such as diplomatic immunity etc. were also applied during this period, such as the appointment of ambassadors, diplomatic immunity, the principle of sovereignty and territorial sovereignty, and principles of trade. Diplomats were appointed from the rank of nobles, and even slaves in some cases. These diplomats carried credentials such as fan, staff, and cane or wore special clothing to signify their rank. There were breaches of diplomatic rules in some cases.[26]

In large areas of Africa there had emerged broadly similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law, this customary law shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty.[27] Thus it seems that customary law in unity in diversity provided a bond between the different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.[28]

The similarities of the West African to the West European system, especially as the latter was before the emergence of the nation state and of permanent diplomacy about the time of the Renaissance, are striking. Ambassadors were dispatched to represent their sovereigns abroad; their work, although it had its hazards, was within the protection of the law; treaties were concluded and solemn sanctions provided to uphold them since, in Africa as in Europe, 'treaties are made to be kept'.[29]

On the given set of arguments, John Foster‟s statement does not hold true. Africa‟s way of living having termed uncivilized could be the basis of the Eurocentric view. This does not however, mean that Africa was an object in the whole creation of international law. Africa has to take pride in its role of creating international law.

QUESTION 3

Dabula Republic and Eyethu Kingdom are neighbouring states. The border between Dabula Republic and Eyethu Kingdom has become the stronghold of a militant organisation, the Economic Emancipation Platoon (EEP). The latter is openly opposed to the governing ideology of Eyethu Kingdom, whose view is supported by Dabula Republic. Therefore, Dabula Republic turns a blind eye to all of W's activities. Members of EEP keep on acquiring weapons and stockpiling them at the border. One day, EEP's members kidnap two soldiers from Eyethu Kingdom. Eyethu Kingdom

25 Smith R "Peace and Palaver International relations in pre-colonial West Africa" 1971 Journal of African History 599–621.
26 Smith 1971 Journal of African History 599–621.
27 Elias T "Africa and the development of international law" 1972.
28 Smith 1971 Journal of African History 599–621.
29 Smith 1971 Journal of African History 599–621.

considers this to be an act of war, invades Dabula Republic, and bombs the area at the border and its surroundings. Eyethu Kingdom justifies its actions by claiming it has acted in anticipatory self-defence, and that its actions also amount to a lawful reprisal in terms of international law. Discuss the validity of Eyethu Kingdom's claim, analysing the requirements for self-defence contained in article 51 of the UN Charter, as well as those of lawful reprisal. [25]

Self defence

Self-defence is governed by Article 51 of the UN Charter, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." This article further provides that the self-defence measures taken by the member state must be reported to the Security Council immediately and that they shall not in any way affect the authority and responsibility the latter to take at any time such action as it deems necessary in order to maintain or restore international peace and security

The following characteristics are important:

- The act taken in exercising the right to self-defence is valid only until the Security Council acts.
- The purpose of the use of force must be clear: to defend oneself.
- The force exercised in self-defence must be proportionate to the posed threat.

It is not clear whether the right to self-defence can be exercised only if an armed attack occurs (whether article 51 amounts to an exclusive and complete formulation of the right), or whether article 51 allows anticipatory self-defence (whether „inherent right" indicates that article 51 has preserved the pre-Charter customary law definition of the right to self-defence, which would include the right to launch a pre-emptive strike).

Article 51 restricts the exercise of the right to self-defence to incidents of an armed attack against a state. A mere threat to peace and security will therefore not suffice. In the Nicaragua case,[30] the ICJ confirmed this position as follows: In the case of individual self-defence, the exercise of this right is subject to the State concerned having been the victim of an armed attack. The Court has recalled that for one State to use force against another state is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack. Thus the lawfulness of the use of force by a State in response to a wrongful act is not admitted when this wrongful act is not an armed attack.

Various arguments have been put forward as to why preventive or anticipatory self-defence based on pre-Charter law is indefensible. A particularly forceful argument is that an interpretation allowing for preventive or anticipatory action is incompatible with the wording of article 51, which restricts self-defence to „if an armed attack occurs" and, to an attack that is „instant, overwhelming, leaving no choice of means, and no moment for deliberation".

Reprisal

In the instance of reprisal the state that has suffered as a result of the breach of international law performs an action which at first glance appears to be unlawful (such as freezing all of the violator state"s assets found in its territory). However, because the injured state has retaliated against the

30 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), (Merits) ICJ Reports 1986

other state‟s illegal action, the act of reprisal will be permissible. It will be considered „„lawful reprisal““, provided that:

- it is indeed in response to a prior illegal act
- it is carried out in the light of restoring equilibrium in international relations
- it is proportionate to the injury sustained
- it has been used as a last resort, which means that the injured state must have first attempted rectification.

On the given scenario, there is no proportionality between self-defence and the first attack of EEP members. Eyethu Kingdom did not act with the intention of restoring peace in international relations as one of the requirements of a lawful reprisal; the act is not proportionate to that of the EEP members. Thus, Eyethu Kingdom under these circumstances would seem to have acted beyond the scope of self-defence and not meeting the requirements of reprisal.

QUESTION 4

A former European head of state, Mr Bulala Rumanof, now resides in Lesotho, thanks to the proceeds of many years of corruption when he was president of the small European country called Rumania Republic. During his tenure, Mr Bulala Rumanof controlled all media houses, ensuring that his transgressions were not widely reported on. He was notorious for issuing orders for police to kill or disappear his political opponents and for the assets forfeiture unit to take over the businesses perceived to be competition to many business entities in Rumania Republic. Following a coup in Rumania Republic, Mr Bulala Romanof hurriedly escapes and settles in Lesotho and soon a warrant is issued by Lesotho courts for his arrest on the grounds of crimes against humanity and misappropriation of state assets. Rumanof claims immunity. Using relevant legislation, case law and developments in international law, discuss whether or not his claim to immunity is valid on an international level and what the situation would have been if he had settled in South Africa. [25]

Immunity is the principle under international law which will prohibit a state from exercising jurisdiction over a matter that would ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved (for example, a head of state) or the nature of the conduct in question.

Firstly, personal immunity provides complete immunity of the person of certain officeholders while they carry out important representative functions‟. It is absolute, covering both private and public acts committed by officials, even those committed prior to their taking office, but temporary, that is, it only applies in so far as the person holds the office in question. This form of immunity is provided for under both customary international law, as well as various treaties.

Secondly, functional immunity relates to conduct carried out on behalf of a state. It is based on the notion that a state may not sit in judgment on the policies and actions of another state, since they are both sovereign and equal. Equally, when a person acts on behalf of a state, whether or not they are officials of that state, they may be able to rely on this form of immunity in respect of any criminal sanctions that would otherwise apply. However, in practice, functional immunity is more commonly raised in civil cases. Functional immunity does not attach to all conduct performed by state officials, it only applies to conduct carried out within the official capacity, therefore, not absolute. It is also permanent and does not lapse when the official ceases to hold office because it is the conduct itself and not the office bearer that forms the basis of that immunity.

In the Ghaddafi case, it was claimed that the Libyan government was involved in the bombing of a U-T-A aircraft which caused the death of the passengers and crew members. A complaint was filed against Ghaddaffi, the Libyan leader. The court accepted the plea of functional immunity and declined jurisdiction.

Immunity and international crimes

Functional immunity does not apply to international crimes, whether prosecuted by international or domestic courts. UN Tribunals and the Rome Statute have stated that „the official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment". Similarly, a number of domestic courts have held functional immunity to be inapplicable to the prosecution of international crimes.

With regards to personal immunity and prosecution of international crimes there is a divide between proceedings before international tribunals and those before domestic courts. In the case of the former, the generally accepted view is that such immunities do not apply before international tribunals, although the question is somewhat complicated in the case of the International Criminal Court (ICC).

Conversely, there is considerable authority for the proposition that personal immunity continues to apply in domestic courts regardless of the nature of the crime in question. In the Arrest Warrant case,[31] the ICJ held that Belgium had „failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law" when it issued an arrest warrant for him for crimes against humanity and war crimes. The court, after considering relevant state practice, concluded that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.

Immunity and international crimes under South African law

South Africa"s own ICC Act appears to take the position that personal immunity does not apply to the prosecution of international crimes in South African courts. The ICC Act states that the fact that a person is or was a head of State or government, a member of a government or parliament, an elected representative or a government official is neither a defence to a crime; nor a ground for any possible reduction of sentence once a person has been convicted of a crime.

On the given set of facts, under international law, Rumanof does not have personal immunity because this form of immunity is temporary; it only applies in so far as the person holds the office in question. Personal immunity does not apply before international tribunals for international crimes and thus Rumanof will be prosecuted. However, under domestic such immunity is applicable; Lesotho will not be legally permissible to arrest Rumanof.

Under South African law Rumanof will not be afforded personal immunity because the ICC Act states that the fact that a person is or was a head of State or government official is neither a defence to a crime; nor a ground for any possible reduction of sentence once a person has been convicted of a crime.

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31 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment) ICJ Reports 2002.

Functional immunity applies if the act committed was on behalf of the state and not personal gain. Rumanof does not have this form of immunity because he maliciously killed political opponents for personal gain and took over businesses of competitors.

OCT / NOV 2020

QUESTION 1

Yolanda Spies in 'Africa and the idea of international society' published in the Journal of Contemporary History 41:1 (2016), 38 – 56, states the following: 'Africa has a rightful claim to being the birthplace of the key institution of the international society, diplomacy'. The same argument can be raised in respect of international law in general. Critically discuss the veracity or otherwise of this statement, in light of Malcolm M Shaw's assertions that 'The foundations of international law as it is understood today lie firmly in the development of Western culture and political organization, and that other territories such as Africa only received it by way of colonization and Christianization'. In your response, and relying on legal and other authority, clearly demonstrate key pre-colonial African contributions to the history and development of international law. [25]

International law is the law that governs relations between states. It is also the law that governs relations between states and international organisations as well as, between international organisations.

Evolution of international law and widely pervasive Eurocentric approach

The evolution of international law has been claimed to be owed to the Western legal players. It is because of this belief that the historical evolution of international law is an integral part of the phenomenon of state formation. This process owed its influence to the conditions that started to prevail towards the end of the 1500s in parts of Europe and which account for what is usually referred to as the Eurocentric nature of „early" international law. The appearance of international relations thus coincided with the rise of several sovereign states as they entered into external relations with one another or when they sought the formation of alliances between themselves for the protection of their own or collective interests.

The period from 1500 to 1648

This period is known for the emergence of modern Europe and was characterised by vigorous economic expansion, followed by social, political and cultural transformations. After two centuries of decline, most areas in Europe now experienced an expansion in population growth with commercial activities becoming stronger and more close-knit within Europe. Geographic discoveries and expansion helped integrate Europe into a kind of world economic system.

This period saw the emergence of Westphalian model. This is an international order consisting mainly or exclusively of independent sovereign States which exercised untrammeled authority within their respective territories and freely coordinated their mutual relations in accordance with their perceived self-interest on the basis of equality. It is a model which upholds state sovereignty and its major role in being a role player in international law. The sovereign equality of states and respect for their independence, ideas that developed between this period are still part of the fundamental principles of international law, and are enshrined in the UN Charter.

The period from 1648 to 1815

This event, described as the „most important event in modern history", called into being a new form of state referred to as the nation state. It was based on a set of rules that were entirely different from those applicable in the colonial motherland at the time that the colonial émigrés started to settle in the new world. What emerged here was the concept of the nation as a political entity that was a voluntary association of a people under a common set of laws and represented by the same government. Connected to this historical notion of state formation were the aspirations of peoples or nations to independent statehood in the political and legal sense of the word. This led to the often interchangeable use of concepts such as „nation" and „state" in international law and in international relations.

The developments in this section provided the foundation for the establishment of a new international order based on a European balance of power. International law became the preserve of the European Christian states. Therefore, by the end of this epoch the new international order reflected European values. Access to this order by foreign states and overseas possessions was possible only with the consent of the Western powers and on conditions determined by them.

The nineteenth century was also the age of the European conferences between the major powers. These contributed significantly to the development of rules governing the waging of war and the settlement of disputes. Through a network of international relations, the application of international law principles expanded and necessitated the academic study of state practice at institutions of higher learning.

The period from 1815 to 1914

This is the period which saw the emergence of colonialism when African states were regarded as terra nullius. Colonial acquisitions were that while the presence of an indigenous population in these territories could prevent or limit the acquisition of private law rights, it could not prevent occupation of the territory for the purpose of asserting state sovereignty rights. Hence, any inhabited territory that was not the sovereign territory of a state, or a protectorate of a state, could become the object of occupation.

According to this theory, subjects of international law were only those states that exercised all rights of sovereignty and performed state functions in the same way as modern European states did. In Africa, although there were more or less distinct forms of political organisation, these were not sufficient to make it possible to speak of a real state. Therefore, they were not subjects of international law and their territory was ownerless in international law. Any recognised subject of international law could occupy Africa as terra nullius.

Before World Wars

Before the outbreak of World War I the Hague International Peace Conferences of 1899 and 1907 played a great role in developing international law. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict. The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns, but had no mitigating effect on Britain"s scorched earth policy and the use of concentration camps in its war against the Boer Republics in South Africa (1899–1902). Nor could it prevent the outbreak of World War I.

Post-World Wars 1 and 2

During World War I the peaceful settlement of disputes received considerable attention in articles 12, 13 and 15 of the League of Nations, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.

The rise of international organisations

The establishment and proliferation of international organisations is generally attributed to the changing nature of international society, which has seen a marked increase in the degree of interactions between states, as well as the complexity of issues involved. In such circumstances, the traditional bilateral and ad hoc relations between states are said to have become outmoded, presenting a need to devise new forms and institutions of organisation. These developments form part of a progressive narrative charting the ongoing transformation of international law itself, from a law of coexistence to co-operation (and perhaps, community).

These periods refer to European scholars, European states and ideas as the foundation of the theories and practice of international law, including ideas such as state sovereignty, states as subject of international law, diplomatic immunity, and international organisations.

Key contributions by Africa to the development

Despite the unwritten nature of law in Africa, and of many of the historical sources, there is abundant evidence of formal relations at the highest governmental levels between the different peoples of West Africa in the pre-colonial period, and there is even some evidence of the existence of an inter-states system.[32]

The diplomatic interactions between African Kingdoms and European powers were mainly regulated by the principles of African customary law. For example, oaths and medicines were taken by parties in order to ensure the sanctity of contracts and treaties. The diplomatic immunity of accorded to representatives were based on customary rules of respect, care and hospitality. The Kingdoms of Benin and Kongo, exchanged ambassadors with Portugal.

Furthermore, slavery and colonialism contributed significantly to the relegation of African contribution to international law. Many of the principles that today guide diplomatic interaction; issues such as diplomatic immunity etc. were also applied during this period, such as the appointment of ambassadors, diplomatic immunity, the principle of sovereignty and territorial sovereignty, and principles of trade. Diplomats were appointed from the rank of nobles, and even slaves in some cases. These diplomats carried credentials such as fan, staff, and cane or wore special clothing to signify their rank. There were breaches of diplomatic rules in some cases.[33]

In large areas of Africa there had emerged broadly similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law, this customary law shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty.[34] Thus it seems that customary law in unity in diversity provided a bond between the

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32 Smith R “Peace and Palaver International relations in pre-colonial West Africa” 1971 Journal of African History 599–621.

33 Smith 1971 Journal of African History 599–621.

34 Elias T “Africa and the development of international law” 1972.

different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.[35]

The similarities of the West African to the West European system, especially as the latter was before the emergence of the nation state and of permanent diplomacy about the time of the Renaissance, are striking. Ambassadors were despatched to represent their sovereigns abroad; their work, although it had its hazards, was within the protection of the law; treaties were concluded and solemn sanctions provided to uphold them since, in Africa as in Europe, 'treaties are made to be kept'.[36]

Umozurike U.O journal onInternational Law and Colonialism in Africa traces the history of the international into old and new to ancient places such as Egypt,China,Ghana and other African Kingdoms to name a few, Umozurike further lays an emphasis on slave trade and colonialism as two of the most forth coming experiences that Africans had from contact with Europeans.[37] Umozurike, like Elias is of the opinion that African people were in fact Sovereign because observed certain norms of the conduct of their external relations, those being diplomacy, trade and various other counterparts in their extensive growth and internal relations but they unfortunately did not possess military power that may have had the ability to withstand Europeans who were able to ignore or deny their sovereignty.[38]

Conclusion

Yolanda Spies assertions that Africa has a rightful claim to being the birthplace of the key institution of the international society, diplomacy are correct. International law in Africa can be traced back time immemorial and its customary/unwritten nature is not a bar to the contributions it made. Malcom Shaw‟s assertions on the other hand are misplaced.

QUESTION 2

The state of Somaliland, whose capital is Hargesia, was once colonized and merged with Somalia, whose capital is Mogadishu to form one entity. Following years of misrule and civil wars, Somalia Hargesia declared its own independence and broke away from Somalia Mogadishu to form the entity known as Somaliland. Today it stands as a self-declared independent 'country'. Somaliland has a population (comprising mainly of Somalis); has a port through which it trades with other states, and it also hosts an American military base near one of its coastal areas. Somaliland also holds regular elections, has a constitution, a supreme court, and a president. Collectively, these institutions are referred to by international agencies as 'the Somaliland Administration'. Political parties are free to operate and contest elections. The Somaliland administration also issues passports to its citizens. Somaliland applies strict Sharia law, which stands above the constitution. Despite all the foregoing, no state recognizes Somaliland as a state. Relying on authority, write an essay in which you critically discuss the status of Somaliland and its claims to be a 'state'. [25]

The Montevideo Convention lists four basic elements required for statehood: (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with other states. This definition is so oft-repeated that it is duplicated, nearly verbatim, in dozens of cases, treaties, and tomes. The Convention also states that although the "political existence of the state is independent of recognition by the other states," such recognition may be explicit or tacit.31

35 Smith 1971 Journal of African History 599–621.
36 Smith 1971 Journal of African History 599–621.
37 Omozurike UO International Law and Colonialism in Africa (Nwamife Publishers 1979) 52.
38 0 Omozurike International Law and Colonialism in Africa 52.

Defined territory

Defined borders are not a prerequisite for statehood. This includes not just land itself but also the territorial sea (in the case of coastal states) and the air space above the state. States‟ territories come „in all shapes and sizes‟. They range considerably in size. Moreover, not all states are single, contiguous landmasses; different parts of a state can be separated from one another (with other states between them). For instance, Alaska and Hawaii are both part of the United States of America, even though they are separate from the other states and, in so far as Alaska is concerned, Canada stands between it and mainland America.32

Although states may have defined territories, many states have disputed borders – that is, disputes over the precise territorial boundaries of the state. In the North Sea Continental Shelf case,33 the ICJ note that there is no rule that the land frontiers of a state must be fully delimited and defined, and often in various places and for long periods they are not, as shown by the case of the entry of Albania into the League of Nations. Israel‟s borders have been disputed for a very long time and even South Africa‟s borders with, for example, Swaziland, are the subject of debate.

International law appears to emphasize the importance of the territorial integrity of states. Generally, the preference is to rely on internal domestic laws of existing states to adjudicate the succession and establishment of new states.[39] Many states and international bodies view the disposition of national territory as a question for the sovereign state to decide: Positive International Law does not recognize the right of national groups, as such, to separate themselves from the State of which they form a part by the simple expression of a wish, any more than it recognizes the right of other States to claim such a separation. [40]

Permanent population:

As is the case with territory, populations come in different sizes. A nomadic population is not a bar to statehood. In the Western Sahara case the court found that the fact that the population is nomadic does not exclude statehood. Rather than looking at the situation of the population in a specific place, one should consider whether the population lives in accordance with an organised, recognisable social and political structure. If it does the population requirement has been met. The important point is that the population must have some sort of relationship to the would-be state.

Effective government:

Effective government implies a system of government in general control of its territory, to the exclusion of other entities‟.[41] The government concerned must demonstrate unrivalled possession and control of public power, whatever the specificities of that might be in any particular setting, and once that unrivalled possession is established with a degree of permanence recognition of statehood may follow. The question is whether there is „a system of government in general control of its territory to the exclusion of other entities‟.

Capacity to enter into relations with other states:

This particular characteristic seems to be problematic. This requirement means that a state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. The fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of its statehood (R v Christian). What is important is the

39 United Nations Charter 1945 (article 2(4).
40 Eggers 2007 Boston College International & Comparative Law Review 215.
41 Strydom H et al International Law (Oxford University Press Southern Africa Cape Town 2016) 69.

presence of external sovereignty. This requirement is also closely linked to the issue of recognition: if the other members of the international community refuse to recognize a state and to enter into relations with it, that state will for all practical purposes be deprived of its capacity to enter into relations with other states.

Recognition

Although some definitions of statehood require the capacity to engage in formal relations with other states, they rarely require recognition by other states.30 The Restatement (Third) of Foreign Relations Law succinctly points out that an entity that satisfies the requirements of the definition of a state is a state whether or not its statehood is formally recognized by other states. International law appears to emphasize the importance of the territorial integrity of states.[42] Generally, the preference is to rely on internal domestic laws of existing states to adjudicate the succession and establishment of new states.[43]

The key difference between the declarative statehood theory and the constitutive theory of statehood lies in this regard.

• Proponents of the constitutive theory claim that the act of recognition is a prerequisite for international legal personality to be created. However this hypothesis is not without its weaknesses. First without observance of the international legal order, it is not clear what the status of unrecognized entities will be.

• What if only certain states accept an entity? Therefore to address this, advocates of the declaratory theory advocate that an act of recognition is not a statehood prerequisite and that such an act merely recognizes an established state of affairs.

In other words, the moment the conditions of the Montevideo Convention have been met, statehood and international legal personality emerge. Consequently, adherents of this school of thought will also point out that there is a legal obligation on other states to accept an entity that meets the criteria of Montevideo (unless that entity came into being after breaking a rule of international law). Of course, the truth is that when states determine whether the other four factual criteria have been met, the decision to recognize may be influenced by political ideology. This can prompt a state to prematurely recognize an entity or refuse it recognition.

• In S v Banda[44] the court had to decide whether Bophuthatswana qualified as a state under international law or not, which would have been relevant to the accused‟s charge of treason which can only be committed against a state. The court considered both the constitutive and the declaratory theories. It came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable, because it was objective, and it took into account only those four requirements, which are based on well-established rules of international law.

Application to the facts

The territory of Somaliland easily meets the criteria set forth by the Montevideo Convention. Somaliland has a permanent population estimated at 3.5 million.[45] Somaliland also has clearly defined territory dating back to the colonial era when it was known as British Somaliland.[46]

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42 Restatement (Third) of Foreign Relations Law of the United States (1987).
43 Eggers 2007 Boston College International & Comparative Law Review 215.
44 S v Banda1989 4 SA 519 (Bop).
45 Eggers 2007 Boston College International & Comparative Law Review 218.
46 Eggers 2007 Boston College International & Comparative Law Review 218.

Somaliland also has a clearly defined government and governance structure which relies heavily on community-based leadership, including highly effective councils of elders. Its constitution calls for separation of powers among the branches of government and serves as the basic law of the land. In December 2002, Somaliland held its first local government elections, followed by a presidential election the following spring.[47]

At first glance, it appears Somaliland might struggle to meet the fourth criteria, the capacity to enter into relations with other states. This impression is incorrect. First, while no other state has established formal diplomatic ties with Somaliland, it is quite clear that Somaliland has the capacity to do so. Somaliland‟s elected government is in consolidated control of the state; there are no rival parties or factions which challenge its claim to be the international "voice" of Somaliland‟s people the way clan factionalism has splintered control of Somalia itself. Somaliland clearly meets the minimum standard of international law in that it has the capacity to engage in diplomatic relations, a mark of statehood.

QUESTION 3

In the past few decades, South Africa has experienced an increase in sporadic attacks against foreigners. Branded as xenophobic attacks by some, and Afrophobic attacks by others, these attacks consist mainly of South African citizens ganging up on foreigners, or any individuals perceived to be non-South Africans, and meting out violence and other inhumane treatment towards those foreigners. In 2008, at the height of anti-foreigner violence and looting in Johannesburg, media houses published pictures of a man burning to death. Ernesto Alfabeto Nhamuave was beaten, stabbed and set alight in Ramaphosa Informal Settlement by a mob during that upsurge of violence, in which 62 people were killed. South African police closed the case on 27 October 2010 after concluding that there were no witnesses and no suspects. These attacks have continued over the years, with the South African Government coming out to condemn these as acts of criminality rather than xenophobic attacks. Interestingly, there is hardly any prosecution for perpetrators of this kind of violence against foreigners. You are approached by the Mozambican Government which claims that it views the killing of Nhamuave and other Mozambican nationals as a violation of its [Mozambican Government's] rights in its national, by the South African Government. You are required to write a legal opinion in which you include, amongst others, advice to the Mozambican Government on whether it does have such a right in international law, and if it does, which forum it would need to approach for which redress. You are further instructed to determine if this is a case of direct or indirect state liability. [25]

State responsibility

States are supposed to respect the rules that define their relationship. This entails that states have diligently to perform the obligations imposed upon them by international law. This duty results from the legal personality of every state as the principal bearer of international obligations. If states fail to perform their obligation, or conduct themselves contrary to their international law commitments, they commit what is called internationally wrongful acts which may be breaches of either treaty law or customary international law.

The state in breach (responsible state) may then incur liability vis a vis the state that has suffered an injury (injured state)) as a result of the breach. State responsibility in this sense may be incurred directly or indirectly. Direct – will occur if the state, acting through its organs breaches international law obligation. Indirect – occurs when the breach injures foreign nationals or their property. Thus

47 Eggers 2007 Boston College International & Comparative Law Review 219.

state liability refers to the body of rules that defines breaches of obligations of state in international law as well as the consequences of such breaches.

2001 ILC Draft Articles on the responsibility of States for Internationally Wrongful Acts (DASR) contains the modern concept of state responsibility in international law.

The DASR deals with the following principles:

• The nature of the responsibility:

Article 1 of the DASR provides that every internationally wrongful act of a state entails the international responsibility of that state.

• Wrongfulness:

The wrongfulness of an act for purposes of state responsibility is determined by international law and is unaffected by a contrary characterisation in the internal law of a state.90 The breach of a legal duty so as to constitute wrongfulness may arise from a positive action of the state or from an omission or failure to act.

• Attributability/Imputability:

the process by means of which certain acts performed by individuals are ascribed to the state – they are taken to be acts by the state itself. There is an internationally wrongful act of a state when conduct consisting of an action or omission (a) constitutes a breach of an international obligation of the state; and (b) is attributable to the state under international law.

• Responsibility for the conduct of state organs:

This rule in article 4(1) of the DASR which states that the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or of a territorial unit of the State.

Circumstances in which the question of attributability may arise:

i. Responsibility for the conduct of state organs In terms of article 4(1) of the Draft Articles on State Responsibility, "[t]he conduct of any State organ shall be considered as an act of state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State and whatever its character as an organ of the central government or a territorial unit of the State." The conduct of an organ of state is regarded as an act of this state in terms of the rules of customary international law.

ii. Responsibility for the conduct of non-state entities exercising elements of governmental authority. This is issue is governed by article 5 of the Draft Articles on State Responsibility, the actions of entities such as parastatal entities can result in state liability, provided that there was some exercise of governmental authority.

iii. Responsibility for the conduct of a private person or a group of persons In terms of article 8, for liability to arise, the private person(s) must have been acting on the instructions, or have been under the control of, the state in question.

• In the Bosnia Genocide case,[48] the ICJ held that for attributability on the basis of instructions to take place, it was not sufficient that the instructions were merely of a general nature relating to the overall actions taken by the persons or group of persons responsible for having committed the violations.

• In Nicaragua,[49]the court had to determine whether the United States could be held responsible for the conduct of a rebel group, the contras. This group was involved in an internal armed conflict with the Nicaraguan government and was responsible for a number of atrocities committed in the course of the conflict. The United States involvement consisted in providing financial and logistical support for the contras as well as training, intelligence, arms and ammunition. The court found that these facts were insufficient „for the purpose of attributing to the United States the acts committed by the contras in the course of their military or paramilitary operations in Nicaragua". For conduct of this kind „to give rise to legal responsibility of the United States, it would in principle have to be proved that that state had effective control of the military or paramilitary operations in the course of which the alleged violations were committed", which was not the case here given the nature of the United States" involvement.

• This effective control test was rejected by the ICTY in the Tadić case as requiring too high a degree of control for attributability.[50] Instead, the tribunal developed what it referred to as the „overall control" test which means that the state has participated in the general direction, coordination and supervision of the activities of the group in question in addition to providing financial, logistical and other assistance to that group.

iv. Responsibility for the conduct and insurgents and insurrectional groups

Generally, a state cannot be held liable for the acts of the insurrectional movement, because the latter has its own structures and organization. However, should that movement become the government of the state, then its actions will be considered to be the actions of that state under international law.

v. Attribution based on subsequent acceptance or approval of a wrongful act

This situation is governed by article 11 of the Draft Articles on State Responsibility and is illustrated by the Tehran Hostages case.

Diplomatic protection

A state has a right to protect its nationals abroad who have been injured by the actions of the foreign state. The state may take up the case of its subject by resorting to diplomatic action, or international judicial proceedings. The cornerstone of this right is that an injury to a national is

48 Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) ICJ Reports 2007 43 [208, 400].
49 Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States) ICJ Reports 1986 [98].
50 Prosecutor v Tadić Appeals Chamber Case IT-94-1-A (15 July 1999) [120].

considered to be an injury to the state. Therefore, under international law, the right of diplomatic protection vests in the state. The state is not under any duty to exercise its right. While the domestic laws of a state may impose such obligation, international law does not. Article 3(1) of Draft Articles on Diplomatic Protection (DADP) determines that the state that is entitled to exercise diplomatic protection is the state of nationality; and according to article 14(1), a state may not pursue an international claim on behalf of a national before that person has exhausted all local remedies. The interesting question is whether South African law imposes such an obligation on the South African government. In this context we shall consider the cases of Kaunda, Van Zyl and Von Abo.

Kaunda

The facts in Kaunda [51]may briefly be summarised as follows: a number of South Africans had been arrested in Zimbabwe and Equatorial Guinea in connection with charges relating to mercenary activities and plotting a coup against the President of the Equatorial Guinea. Those arrested in Zimbabwe feared that they would be extradited to Equatorial Guinea. All the Applicants claimed that they would not receive a fair trial in Equatorial Guinea. Furthermore, they contended that, if they were convicted in Equatorial Guinea, they would be sentenced to death. They claimed, therefore, that the South African government was under an obligation to offer them diplomatic protection.

The court dismissed the application. The majority decision, written by Chaskalson CJ (as he was then known), recognised that international law did not oblige a state to provide diplomatic protection, but in terms of the South African Constitution, there was at least some obligation on the part of the government to provide protection to its nationals abroad.

The court began by asserting that a request to the South African government for diplomatic protection was unlikely to be refused if there had been a gross violation of international human rights norms, and the evidence to that effect was clear. Should a request for diplomatic protection ever be refused “the decision would be justiciable, and a court could order the government to take appropriate action”.

The court also noted that the assertion of diplomatic protection was “essentially a function of the executive” with which the “courts are ill equipped to deal”. However, if the executive were to refuse to consider a legitimate request, or if it were to deal with it in bad faith or irrationally, the court could intervene. In other words, while the executive has a broad discretion when conducting foreign affairs, the courts can review such decisions on the grounds of, for example, irrationality and bad faith. In a concurring opinion, Ngcobo J, examined, inter alia, section 3 (the right to a common South African citizenship) and section 7 which provides that:

i. The Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.
ii. ii. The state must respect, protect, promote and fulfill the rights in the Bill of Rights. Ngcobo J concluded that “diplomatic protection is a benefit within the meaning of section 3(2) (a). It follows therefore that sections 3(2) (a) and 7(2) must be read as imposing a constitutional duty on the Government to ensure that all South African nationals abroad enjoy the benefits of public protection. The proposition that the Government has no constitutional duty in this regard must be rejected. Such a proposition is inconsistent with the Government‟s own declared policy and acknowledged constitutional duty".

51 Kaunda v President of the Republic of South Africa 2005 (4) SA (CC).

The dissenting opinion of O"Regan J acknowledged that the conduct of foreign affairs is typically an executive power under the Constitution and submitted that, in the conduct of foreign relations, "the executive must be afforded considerable latitude". She suggested that the court should declare that the executive was "under a constitutional obligation to take appropriate steps to provide diplomatic protection", but that the executive itself was best placed to determine what steps it should take.

Van Zyl

In Van Zyl[52] the applicants requested the South African government to extend diplomatic protection to them in their dispute with the government of the Kingdom of Lesotho. The dispute related to expropriation of the applicants" mining leases, mining rights and tributing agreements without compensation being paid to them. The contracts referred to were not internationalized. The expropriation had taken place in execution of the Lesotho Highlands Water Project. The latter was provided for in a treaty between the SA government and that of Lesotho.

It was claimed that the applicants were entitled to diplomatic protection, because the government of Lesotho had committed an international delict. The SA government had refused the application on the grounds that no right to diplomatic protection accruing to an individual existed in international law (since, in deciding to exercise diplomatic protection, the SA state would have been inserting its own right). The applicants also contended that inaction by the SA government would lead to a violation of a number of provisions of the SA Constitution.

Ultimately, the application was dismissed. Amongst others, the applicants could not prove that Lesotho had committed an international delict, nor did they satisfy the two prerequisites for the admissibility of a claim for purposes of diplomatic protection (nationality and exhaustion of local remedies.) The court pointed out that neither international law, nor the Constitution recognised the right to diplomatic protection. The court distinguished the case from Kaunda in that the latter concerned gross human right violations, while in the Van Zyl case the applicants had been expropriated and international law did not recognise the protection of property as an international human right.

Von Abo

In Von Abo[53] the applicant was a South African farmer in Zimbabwe. Zimbabwe had violated his rights by destroying his property interests in many Zimbabwean farms as part of a governmental scheme of expropriation. Von Abo was not compensated and he had exhausted all local remedies. Von Abo requested the South African government to afford him diplomatic protection vis-à-vis Zimbabwe. The applicant claimed that he had a right to such protection in terms of the South African Constitution. Relying on the judgment in Kaunda, the court in Von Abo found that there need not be an actual refusal on the part of government to grant diplomatic protection before a court would intervene. The court stated that, in an appropriate case, a court could also come to the assistance of the aggrieved national where government "fails to respond appropriately" or "deals with the matter in bad faith or irrationally". The court relied on, inter alia, the judgment in Kaunda to conclude that the state had a duty to provide assistance to the applicant. This was a Transvaal Provincial Division judgment.

Application to the facts

52 Van Zyl v Government of the RSA 2008 (3) SA 294 (SCA).
53 Von Abo v Government of the RSA 2009 (2) SA 526 (T).

Mozambique has a right to protect its nationals wherever they are violated. On the given scenario, South African nationals have been unlawfully attacking foreigners and the South African government has been hesitant to interfere in stopping these attacks. The Mozambiquean government will have to prove that its violated nationals have exhausted all internal remedies to seek redress in the South African domestic courts before the matter is taken to international courts. In a nutshell, the South African government is indirectly liable for the actions of its nationals. Responsibility is attributed under these circumstances.

QUESTION 4

African states, acting individually and also as a collective under the African Union (AU) have decried what they perceive as hypocrisy and bias in the manner in which the International Criminal Court (ICC) delivers justice. The AU accused the ICC of bias in that its prosecutorial project only focused on African leaders and senior state officials. At the core of the African disdain for the ICC's foray into Africa is the belief that the ICC's targets, that is, African heads of states and other senior officials, enjoy immunity from prosecution. Their argument is that this immunity is enjoyed even where a matter is before the ICC, a position the AU argues is supported by customary international law. Coupled with these is the complaint that the current ICC jurisdictional provisions allow it to extend its jurisdiction over persons who are nationals of non-state parties, and in cases that did not take place on the territory of a state party. Critically analyze and discuss these assertions by the AU, indicating whether they find support in treaty law or customary international law; or in any jurisprudence from both international tribunals and domestic courts. [25]

International law can in some cases, prohibit a court from exercising, by the concept of immunity, criminal or civil jurisdiction over foreign states and their representatives. According to this principle, international law forbids a state from exercising jurisdiction over a matter that would usually fall within its jurisdiction, either on the basis of the identity of the person or agency concerned (for example, the head of state) or on the basis of the essence of the conduct in question.[54]

Personal Immunity

This form of immunity provides complete immunity of the person of certain officeholders while they carry out important representative functions". It is absolute, covering both private and public acts committed by officials, even those committed prior to their taking office, but temporary, that is, it only applies in so far as the person holds the office in question. This form of immunity is provided for under both customary international law, as well as various treaties.

In the Arrest Warrant it was held that these immunities also extend to certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.

This form of immunity is provided for under customary international law,[55] as well as various treaties but chiefly the 1961 Vienna Convention on Diplomatic Relations.[56]The court in Arrest Warrant held that the Vienna Convention on Diplomatic Relations, to which both the Congo and Belgium are parties, reflects customary international law. It further held that the conventions provide useful guidance on certain aspects of the question of immunities. They do not, however, contain any provision specifically defining the immunities enjoyed by Ministers for Foreign Affairs. It is

54 Strydom et al International Law 253.
55 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) ICJ Reports 2002 [52].
56 Vienna Convention on Consular Relations 1963.

consequently on the basis of customary international law that the Court must decide the questions relating to the immunities of such Ministers raised in the present case.

The relevance of personal (diplomatic) immunity in the prosecution of international crimes is more complex. Here, there is a divide between proceedings before international tribunals and those before domestic courts.

• In international courts, the generally accepted view is that such immunities do not apply before international tribunals, although the question is somewhat complicated in the case of the International Criminal Court (ICC).

• there is considerable authority for the proposition that personal immunity continues to apply in domestic courts regardless of the nature of the crime in question. Most clearly (and authoritatively), in the Arrest Warrant case, the ICJ held that Belgium had „failed to respect the immunity from criminal jurisdiction and the inviolability which the incumbent Minister for Foreign Affairs of the Democratic Republic of Congo enjoyed under international law" when it issued an arrest warrant for him for crimes against humanity and war crimes.

With growing international pressure for heads of state to be liable for their actions, a recent resolution adopted by the Institute of International Law provides guidance. At the moment the provisions of the resolution can only be classified as non-binding "soft law". The main provisions of the resolution provide the following:

• For the period in which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.

• A former head of state enjoys immunity solely in respect of acts which are performed in the exercise of official functions.

It is expressly stated that they may be prosecuted for acts constituting a crime under international law, or misappropriation of the state"s assets or resources.

Functional immunity

This form of immunity relates to conduct carried out on behalf of a State. It is based on the notion that a state may not sit in judgment on the policies and actions of another state, since they are both sovereign and equal. Equally, when a person acts on behalf of a state, whether or not they are officials of that state, they may be able to rely on this form of immunity in respect of any criminal sanctions that would otherwise apply. However, in practice, functional immunity is more commonly raised in civil cases.

Different from personal immunity, functional immunity does not attach to all conduct performed by state officials, it only applies to conduct carried out within the official capacity, therefore, not absolute. It is also permanent and does not lapse when the official ceases to hold office because it is the conduct itself and not the office bearer that forms the basis of that immunity.

This form of immunity is given effect to under South African law by the Foreign States Immunities Act,[57] in terms of which „a foreign state shall be immune from the jurisdiction of the courts of the Republic". In the Arrest Warrant case it was held that in customary international law, the immunities accorded to Ministers for Foreign Affàirs are not granted for their personal benefit, but to ensure the effective performance of their functions on behalf of their respective States.[58]

57 Foreign States Immunities Act 87 of 1981.
58 Arrest Warrant 53.

It is widely accepted that functional immunity does not apply to international crimes, whether prosecuted by international or domestic courts. Such immunity does not apply to „acts condemned as criminal by international law". The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment". Similarly, a number of domestic courts have held functional immunity to be inapplicable to the prosecution of international crimes.

The most famous decision is the Pinochet case where, albeit for different reasons, the UK House of Lords found that General Pinochet could not rely on functional immunity in order to avoid being extradited to Spain to face allegations of torture. The court found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity only for acts performed in the "exercise of his functions as head of state.[59]

In the Ghaddafi case, it was claimed that the Libyan government was involved in the bombing of a U-T-A aircraft which caused the death of the passengers and crew members. A complaint was filed against Ghaddaffi, the Libyan leader. The court however, accepted the plea of immunity and declined jurisdiction.

There is growing international pressure for heads of state to be liable for their actions. A head of state remains subject to private law that protects creditors and other individuals. A head of state also has no immunity regarding the misappropriation of his state's assets.

Jurisdiction of the ICC

The International Criminal Court (the ICC) is a permanent international court established to investigate, prosecute and try individuals accused of committing the most serious crimes of concern to the international community as a whole, namely the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

In terms of article 12 of the Rome Statute when a State becomes a party to the Rome Statute, it agrees to submit itself to the jurisdiction of the ICC with respect to the crimes enumerated in the Statute. The Court may exercise its jurisdiction in situations where the alleged perpetrator is a national of a State Party or where the crime was committed in the territory of a State Party. Also, a State not party to the Statute may decide to accept the jurisdiction of the ICC. These conditions do not apply when the Security Council, acting under Chapter VII of the United Nations Charter, refers a situation to the Office of the Prosecutor.

The ICC prosecutes individuals, not groups or States. Any individual who is alleged to have committed crimes within the jurisdiction of the ICC may be brought before the ICC. No one is exempt from prosecution because of his or her current functions or because of the position he or she held at the time the crimes concerned were committed. Acting as a Head of State or Government, minister or parliamentarian does not exempt anyone from criminal responsibility before the ICC. In some circumstances, a person in a position of authority may even be held responsible for crimes committed by those acting under his or her command or orders. Likewise, amnesty cannot be used as a defence before the ICC. As such, it cannot bar the Court from exercising its jurisdiction.

Application to the facts

Heads of states and any other person performing duties on behalf of the state are immune from jurisdiction in as far as they are within the scope of their duties. With regards to personal immunity

59 R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) 119 ILR 136 (1999)–[2000].

the generally accepted view is that such immunities do not apply before international tribunals, state officials will not be protected.

The allegations that the ICC is only targeting African countries are not true. The ICC is concerned with countries that have accepted the Court‟s jurisdiction and these are in all continents. African countries made great contributions to the establishment of the Court and influenced the decision to have an independent Office of the Prosecutor. In 1997, the Southern African Development Community (SADC) was very active in supporting the proposed Court and its declaration on the matter was endorsed in February 1998, by the participants of the African Conference meeting in Dakar, Senegal, through the “Declaration on the Establishment of the International Criminal Court”. At the Rome Conference itself, the most meaningful declarations about the Court were made by Africans. Without African support the Rome Statute might never have been adopted. In fact, Africa is the most heavily represented region in the Court‟s membership. The trust and support comes not only from the governments, but also from civil society organisations. The Court has also benefited from the professional experience of Africans and a number of Africans occupy highlevel positions in all organs of the Court.

MAY / JUNE 2020

QUESTION 1

Writing in 1909, John Foster asserted ‘until the fall of the Roman empire, states were largely insular and regarded other nations as barbarians and enemies’, and such did not practice international law.[60] As such no international law proper existed. Writing over 100 years later, Malcolm Shaw aligned himself with Foster’s approach to the evolution of international law. Shaw wrote, 'the foundations of international law as it is understood today lie firmly in the development of Western culture and political organisation'.[61]

In light of the above assertions, write an essay in which you critically discuss the evolution of international law, highlighting the widely pervasive Eurocentric approach as well as key contributions by Africa to the development of the subject. [25]

International law is the law that governs relations between states. It is also the law that governs relations between states and international organisations as well as, between international organisations.

EVOLUTION OF INTERNATIONAL LAW AND WIDELY PERVASIVE EUROCENTRIC APPROACH

The evolution of international law has been claimed to be owed to the Western legal players. It is because of this belief that the historical evolution of international law is an integral part of the phenomenon of state formation. This process owed its influence to the conditions that started to prevail towards the end of the 1500s in parts of Europe and which account for what is usually referred to as the Eurocentric nature of „early“ international law.

The appearance of international relations thus coincided with the rise of several sovereign states as they entered into external relations with one another or when they sought the formation of alliances between themselves for the protection of their own or collective interests.

The period from 1500 to 1648

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60 Foster J ‘The evolution of international law’ (1909) Yale Law Journal XVIII (3) 149 – 164, 152
61 Shaw MN International Law (2003) 13.

This period is known for the emergence of modern Europe and was characterised by vigorous economic expansion, followed by social, political and cultural transformations. After two centuries of decline, most areas in Europe now experienced an expansion in population growth with commercial activities becoming stronger and more closeknit within Europe. Geographic discoveries and expansion helped integrate Europe into a kind of world economic system.

This period saw the emergence of Westphalian model. This is an international order consisting mainly or exclusively of independent sovereign States which exercised untrammeled authority within their respective territories and freely coordinated their mutual relations in accordance with their perceived self-interest on the basis of equality. It is a model which upholds state sovereignty and its major role in being a role player in international law. The sovereign equality of states and respect for their independence, ideas that developed between this period are still part of the fundamental principles of international law, and are enshrined in the UN Charter.

The period from 1648 to 1815

This event, described as the „most important event in modern history", called into being a new form of state referred to as the nation state. It was based on a set of rules that were entirely different from those applicable in the colonial motherland at the time that the colonial émigrés started to settle in the new world. What emerged here was the concept of the nation as a political entity that was a voluntary association of a people under a common set of laws and represented by the same government.Connected to this historical notion of state formation were the aspirations of peoples or nations to independent statehood in the political and legal sense of the word. This led to the often interchangeable use of concepts such as „nation" and „state" in international law and in international relations.

The developments in this section provided the foundation for the establishment of a new international order based on a European balance of power. International law became the preserve of the European Christian states. Therefore, by the end of this epoch the new international order reflected European values. Access to this order by foreign states and overseas possessions was possible only with the consent of the Western powers and on conditions determined by them.

The nineteenth century was also the age of the European conferences between the major powers. These contributed significantly to the development of rules governing the waging of war and the settlement of disputes. Through a network of international relations, the application of international law principles expanded and necessitated the academic study of state practice at institutions of higher learning.

The period from 1815 to 1914

This is the period which saw the emergence of colonialism when African states were regarded as terra nullius. Colonial acquisitions were that while the presence of an indigenous population in these territories could prevent or limit the acquisition of private law rights, it could not prevent occupation of the territory for the purpose of asserting state sovereignty rights. Hence, any inhabited territory that was not the sovereign territory of a state, or a protectorate of a state, could become the object of occupation.

According to this theory, subjects of international law were only those states that exercised all rights of sovereignty and performed state functions in the same way as modern European states did. In Africa, although there were more or less distinct forms of political organisation, these were not sufficient to make it possible to speak of a real state. Therefore, they were not subjects of

international law and their territory was ownerless in international law. Any recognised subject of international law could occupy Africa as terra nullius.

Before World Wars

Before the outbreak of World War I the Hague International Peace Conferences of 1899 and 1907 played a great role in developing international law. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict. The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns, but had no mitigating effect on Britain‟s scorched earth policy and the use of concentration camps in its war against the Boer Republics in South Africa (1899–1902). Nor could it prevent the outbreak of World War I.

Post-World Wars 1 and 2

During World War I the peaceful settlement of disputes received considerable attention in articles 12, 13 and 15 of the League of Nations, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.

The rise of international organisations

The establishment and proliferation of international organisations is generally attributed to the changing nature of international society, which has seen a marked increase in the degree of interactions between states, as well as the complexity of issues involved. In such circumstances, the traditional bilateral and ad hoc relations between states are said to have become outmoded, presenting a need to devise new forms and institutions of organisation. These developments form part of a progressive narrative charting the ongoing transformation of international law itself, from a law of coexistence to cooperation (and perhaps, community).

These periods refer to European scholars, European states and ideas as the foundation of the theories and practice of international law, including ideas such as state sovereignty, states as subject of international law, diplomatic immunity, and international organisations.

Key contributions by Africa to the development

Despite the unwritten nature of law in Africa, and of many of the historical sources, there is abundant evidence of formal relations at the highest governmental levels between the different peoples of West Africa in the pre-colonial period, and there is even some evidence of the existence of an inter-states system.[62]

The diplomatic interactions between African Kingdoms and European powers was mainly regulated by the principles of African customary law. For example, oaths and medicines were taken by parties in order to ensure the sanctity of contracts and treaties. The diplomatic immunity of accorded to representatives were based on customary rules of respect, care and hospitality. The Kingdoms of Benin and Kongo, exchanged ambassadors with Portugal.

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62 Smith R “Peace and Palaver International relations in pre-colonial West Africa” 1971 Journal of African History 599–621.

Furthermore, slavery and colonialism contributed significantly to the relegation of African contribution to international law. Many of the principles that today guide diplomatic interaction, issues such as diplomatic immunity etc. were also applied during this period, such as the appointment of ambassadors, diplomatic immunity, the principle of sovereignty and territorial sovereignty, and principles of trade. Diplomats were appointed from the rank of nobles, and even slaves in some cases. These diplomats carried credentials such as fan, staff, cane or wore special clothing to signify their rank. There were breaches of diplomatic rules in some cases.[63]

In large areas of Africa there had emerged broadly similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law, this customary law shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty.[64] Thus it seems that customary law in unity in diversity, provided a bond between the different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.[65]

The similarities of the West African to the West European system, especially as the latter was before the emergence of the nation state and of permanent diplomacy about the time of the Renaissance, are striking. Ambassadors were despatched to represent their sovereigns abroad; their work, although it had its hazards, was within the protection of the law; treaties were concluded and solemn sanctions provided to uphold them since, in Africa as in Europe, 'treaties are made to be kept'.[66]

Conclusion

It is not true that international law originates from Europe, because many pre-colonial African empires practiced international law in one form or the other.

QUESTION 2

In Democratic Alliance v Minister of International Relations and Co-operation Case No 58755/17, delivered by the North Gauteng High Court on 30 July 2018, the court had to deal with the supposed immunity of Grace Mugabe, the wife of former president of Zimbabwe.

Answer the following questions based on the case above. Remember to substantiate your answer with other international law authorities.

(a) Define the concept of immunity in the context of international law. (3)

Immunity is the principle under international law which will prohibit a state from exercising jurisdiction over a matter that would ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved (for example, a head of state) or the nature of the conduct in question.

(b) Discuss the various forms of immunity that can be enjoyed by various office bearers in international law. (7)

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63 Smith 1971 Journal of African History 599–621.
64 Elias T “Africa and the development of international law” 1972.
65 Smith 1971 Journal of African History 599–621.
66 Smith 1971 Journal of African History 599–621.

There are two forms of immunity, namely, personal and functional immunity.

i. Personal immunity This form of immunity provides complete immunity of the person of certain officeholders while they carry out important representative functions". It is absolute, covering both private and public acts committed by officials, even those committed prior to their taking office, but temporary, that is, it only applies in so far as the person holds the office in question. This form of immunity is provided for under both customary international law, as well as various treaties.

In the Arrest Warrant[67] it was held that these immunities also extend to certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.

ii. Functional immunity
This form of immunity relates to conduct carried out on behalf of a State. It is based on the notion that a state may not sit in judgment on the policies and actions of another state, since they are both sovereign and equal. Equally, when a person acts on behalf of a state, whether or not they are officials of that state, they may be able to rely on this form of immunity in respect of any criminal sanctions that would otherwise apply. However, in practice, functional immunity is more commonly raised in civil cases.

Different from personal immunity, functional immunity does not attach to all conduct performed by state officials, it only applies to conduct carried out within the official capacity, therefore, not absolute. It is also permanent and does not lapse when the official ceases to hold office because it is the conduct itself and not the office bearer that forms the basis of that immunity.

iii. Diplomatic immunity
In terms of section 3(1) of the DIPA, the Vienna Convention on Diplomatic Relations 1961 applies to all diplomatic missions and members of such missions in the Republic. The reason for this immunity is because of the functions which are performed by the diplomats (diplomats represent their state, protect the interests of their nationals, conduct negotiations between their government and the government of the host state, report on conditions in the host state and promote friendly relations). It could also, in certain circumstances, be difficult for the embassy to fulfil its protective function without immunity. The reason behind diplomatic immunity is therefore to enable the mission to perform its functions.

iv. Consular immunity
In terms of section 3(2) of the DIPA, the Vienna Convention on Consular Relations 1963 applies to all consular posts and members of such posts in the Republic. The reasoning behind consular immunity is the same as that behind diplomatic immunity. However, because a consulate has less status than an embassy, the extent of its immunity is reduced accordingly.

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67 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment) ICJ Reports 2002.

(c) In an essay, critically discuss how the court approached the claims by the Minister of International Relations that Grace Mugabe enjoyed immunity from prosecution in South African courts by virtue of her status as a spouse of a foreign head of state. (15) [25]

The Minister in the current case gave immunity to Grace under section 7(2) of Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA). This section states that the Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette.[68]

The issues before the court were as follows:[69]

1. Did Mugabe enjoy immunity for the alleged unlawful act perpetrated against Engels by virtue of being a spouse of a head of state?

2. If not, was the decision of the Minister to confer or grant immunity to Mugabe constitutional and lawful?

The court held that customary international law is a recognised well established practice that states adhere to in their dealings with each other.[70] For customary law to be applicable it has to meet both requirements usus and opinio juris not only one. Usus was met but whether opinio juris was met was a question of fact as well a question of law. The court held that immunity is not for personal gain of the official but it exists to ensure that states function effectively and that there is a well ordered workable system of international relations where peace and harmony can exist between states. [71]

The court quoted Arrest Warrant case in that the functions of Minister Foreign Affairs (this applies to the head of state as well as the head of government) are such that throughout the duration of his/her office he/she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity that inviolability protects the individual concerned against any act of authority of another state which would hinder him/her in the performance of his/her duties.[72]

In answering whether personal immunity applies to the spouse of the head of state, the court held that in a South African context personal immunity will be granted where:

i. A customary norm that is consonant with the prescripts of the Constitution;
ii. The prescripts of an international treaty which is constitutionally compliant; and
iii. National legislation which is constitutionally compliant. The decision that does not fall within one of the above categories will not withstand the test of legality, reasonableness and rationality.

The court further held that the customary international law provides the contextual background of Foreign States Immunities Act 87 of 1981 (FSI). The object of FSI is to determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic and to give effect and some meaning to international customary law. The FSI continues to state that a foreign state shall be immune from the jurisdiction the courts of the Republic except as provided in this Act or in any proclamation issued thereunder which is then qualified with exceptions. One exception is found in section 6(a) that a foreign state shall not be immune from jurisdiction of the courts of the Republic in

68 Diplomatic Immunities and Privileges Act 37 of 2001.
69 Democratic Alliance v Minister of International Relations and Co-operation Case No 58755/17.
70 Article 38(1)(b) of the Vienna Convention on the Law of Treaties.
71 Democratic Alliance v Minister of International Relations and Co-operation [17].
72 Democratic Alliance v Minister of International Relations and Co-operation [18].

proceedings relating to the death or injury of a person (which is what Grace Mugabe was charged with).

In terms of this section 6(a) the former President Mugabe would not have enjoyed immunity because such personal immunity has officially been withdrawn by the current section. South African law has parted company with the customary international law and section 232 of the Constitution allows this.

Thus even if the Minister was corrected in her analysis that customary international law accorded immunity to Dr. Mugabe, her conclusion that this immunity has been extended was to our law was unlawful.[73] The court further held that by recognizing the personal immunity the Minister committed an error of law. An error which was fundamental and fatal. It held that such immunity had to be set aside. The court contended that the Minister had the authority to grant the immunity in terms of section 7(2) of DIPA, however, this authority has to be exercised in a manner that is constitutional and lawful.[74] The final decision was therefore, that Grace Mugabe was not immune from jurisdiction.

QUESTION 3

Dondon Republic is a newly formed state that broke away from Namibia in the year 2015. It has a vibrant legislature, a struggling economy, an effective government and relates very well with its neighbours. Dondon Republic wishes to sign and accede to many international law treaties that it hopes will benefit its fledgling economy and enhance its international standing. Dondon Republic embraces strict Sharia law, and does not allow religious plurality. Although the territory has a constitution strikingly similar to the South African Constitution, its supremacy is only secondary to the prescripts of Sharia law. For instance, the Dondonians believe that if a man rapes a woman, such man must be compelled to marry that woman. They also believe that women should not be allowed to drive, nor should girls be allowed in public unless they are accompanied by a male relative. The education of girls is also frowned upon.

Dondon Republic wants to sign the following treaties:

the Convention on the Rights of the Child; the Convention for the Elimination of All Forms of Discrimination Against Women; the African Charter on the Rights and Welfare of the Child; and the Agreement Establishing the African Continental Free Trade Agreement (AfCFTA). The Dondon Parliament has mandated the Minister of Foreign Affairs to proceed with concluding the treaties above, and any others that would benefit the Republic of Dondon. However, Parliament cautioned the Minister not to sign treaties that would run counter to Sharia law.

In light of the above, answer the following questions:

(a) What international law remedy is available for the Minister to ensure that signing the above international instruments does not conflict with Dondon's Sharia law? (2)

Reservations

The international law remedy that is available for the Minister to ensure that signing the above international instruments does not conflict with Dondon‟s Sharia law is a reservation to a treaty. Article 2(1)(d) of the VCLT defines reservations as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it

73 Democratic Alliance v Minister of InternationRelations and Co-operation [40].
74 Democratic Alliance v Minister of InternationRelations and Co-operation [44].

purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

(b) The Minister upon signing, indicates that the State of Dondon will enter reservations on clauses that provide for: the equality of men and women; the right to education for girls; the right to marry and found a family. He explains that to sign the treaties without these reservations would place the State of Dondon in a precarious position, where it would be torn between its international obligations and its domestic duties flowing from Sharia law. Advise the Minister if these reservations can lawfully be made in international law. (10)

Lawful reservations

Reservations are guided by Article 19 of the VCLT which provides that a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

i. the reservation is prohibited by the treaty;

ii. the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

iii. in cases not failing under subparagraphs (i) and (ii), the reservation is incompatible with the object and purpose of the treaty. Even if a state is allowed to exclude some provisions of a treaty to which it is party, it can only do so if the effect of the reservation is not to undermine the object and purpose of the treaty.

A treaty may altogether disallow the making of reservations or only allow reservations to certain provisions of the treaty. In the case of permissible reservations, a state may not formulate a reservation that cannot be reconciled with the object and purpose of the treaty. Of further importance is the fact that a reservation must be made at the time of signing, ratifying, accepting, approving or acceding to a treaty and not thereafter.

In the Genocide Convention[75] case it was held that if the reservation is not compatible with the object and purpose of the Convention, then the reserving state cannot be regarded as being a party to the Convention. The court also added that a state objecting to a reservation that it considers to be incompatible with the object and purpose of the Convention is entitled to consider the reserving state not to be a party to the Convention. For states with the opposite view, the reserving state will then still be considered to be a party to the Convention.

Acceptance by a state party of a reservation made by another state party causes the latter to be a party to the treaty in relation to the accepting state, if or when the treaty is in force between them. In the case of a contracting state objecting to a reservation, the objection will not preclude the entry into force of the treaty between the objecting and reserving state, unless the objecting state expressly indicated a contrary intention. An act expressing a state‟s consent to be bound by a treaty and containing a reservation will take effect as soon as one other contracting state has accepted the reservation. It must also be noted that reservations and objections can be withdrawn at any time, or as stipulated by the treaty itself.

Together with article 19 of the VCLT and the ICJ‟s advisory opinion, it should be clear that the general rule is that all treaties may be accepted subject to reservations. If the treaty is silent on the question of reservations, it may be assumed that reservations are allowed. Due to the fact that treaties are

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75 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) ICJ Reports 1951 (Genocide Convention).

consensual and a proposed reservation is an offer, it stands to reason that the other parties to the multilateral treaty may do one of two things. Such states may either accept the reservation or reject the reservation made by another state.

Application to the facts

Dondon Republic wants to sign the following treaties: the Convention on the Rights of the Child; the Convention for the Elimination of All Forms of Discrimination Against Women; the African Charter on the Rights and Welfare of the Child; and the Agreement Establishing the African Continental Free Trade Agreement. The Minister upon signing, indicates that the State of Dondon will enter reservations on clauses that provide for: the equality of men and women; the right to education for girls; the right to marry and found a family.

From the names of the treaties to be concluded and the reservations by Dondon Republic the purpose and object of the treaties in question will be defeated. Dondon Republic does not believe in equality and yet want to be a party to the Elimination of All Forms of Discrimination Against Women treaty, reserving on the equality of men and women will defeat the purpose and object this treaty. Further, Dondon Republic wants to reserve on the right to education for girls of which the Convention on the Rights of the Child treaty aims to protect such rights. Lastly, the reservation on the right to marry and found a family will also defeat the purpose of the Agreement Establishing the African Continental Free Trade Agreement.

(c) Write brief notes on the invalidity of treaties in general. (13) [25]

Invalidity of treaties in general

The invalidity of a treaty, or of the consent of a state to be bound by a treaty, may only occur through the application of the VCLT. The validity of a treaty can be contested on the basis of error, fraud, corruption or coercion of a state representative.

An error will invalidate the consent to be bound by a treaty if it relates to a fact or situation that was assumed by the consenting state at the time and which formed an essential basis of that state‟s consent to be bound. However, this will not apply if the state contesting the validity contributed by its own conduct to the error, or, if under the circumstances, the state should have known about a potential error.

Consent to be bound by a treaty will also be invalidated if the consent was induced by the fraudulent conduct of another state or procured through the corruption or coercion of a state representative.

The following are the circumstances under which a party may raise invalidity of a treaty:

i. A state may invoke error if it assumed that a fact or situation which was material and formed the basis of consent when the treaty was concluded and it did not itself contribute to the error or the circumstances were not suspicious.
ii. A state may invoke fraud if it was induced by fraudulent action of other negotiating states to conclude the treaty.
iii. A state may invoke corruption if there was direct or indirect corruption of the state‟s representative by another negotiating state.
iv. A state may invoke coercion where there was coercion of a representative by acts or threats against the representative by any person.
v. A state may invoke force if there was coercion of a state by threat or use of force contrary to the principles of international law in the UN Charter.

A treaty will be rendered void in two instances: first, if the conclusion of the treaty has been induced by the threat or use of force in violation of the principles of international law embodied in the UN Charter and secondly, if at the time of its conclusion it was in conflict with a peremptory norm of general international law. Article 53 of the VCLT defines a peremptory norm (jus congens) as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

QUESTION 4

Write short notes on the following:

(a) The forms of jurisdiction that a court could rely on under international law. 10)

The principle of territoriality

In terms of the principle of territoriality all crimes committed or alleged to have been committed within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens. This principle is „universally recognized", and, as a matter of practice, states routinely assert jurisdiction over criminal acts that occur within their territory and over the persons responsible for such acts.

The nationality principle

In terms of the nationality principle, a state may choose to exercise jurisdiction over crimes committed abroad when they are commited by nationals of that state. The link or connecting factor between the state and the conduct in question is the nationality of the perpetrator.

Passive personality

In terms of the passive personality principle, a state may choose to exercise jurisdiction over extraterritorial crimes committed, or intended to be committed, against their nationals (and in some instances their ordinary residents). Here, the link between the state and the conduct in question is the nationality of the victim of the crime in question. This principle is in a sense the „reverse of the coin" of the nationality principle. In the Arrest Warrant case it was held that passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

The protective principle

A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.

The effects principle

In terms of this principle, a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.

Universal jurisdiction

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

(b) The methods of peaceful settlement of international disputes between states under international law. (15) [25]

Negotiation

The ICJ has emphasised that the parties „must negotiate with the aim of arriving at an agreement, and not merely go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement." Negotiations must be a genuine attempt to engage in discussions.

Mediation

In this instance, the states are assisted through the intervention of a third party (the mediator). The mediator is actively involved in conveying each party"s proposals and ideas, and looking for a solution to the problem. Mediation is also known as „good offices.

Conciliation

In this instance, a commission set up for that purpose, either permanently or an ad hoc basis, and it assists the parties to the dispute. This is a formalised form of mediation and it is usually decided upon through a bilateral arrangement. See the prescribed textbook for a number of such treaty examples.

Inquiry

Article 9 of the 1907 Hague Convention for the Pacific Settlement of Disputes provides that where the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation. An important example, is article 34 of the UN Charter, which provides that the Security Council is to investigate disputes which are „likely to endanger the maintenance of international peace and security."

Arbitration

Arbitration has been defined by the International Law Commission as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.

Parties must agree on:

- The identity of the arbitrators
- The content of the legal question(s)
- What rules of law would apply to the dispute (they are not necessarily rules of public international law)
- The time frame within which the award must be made
- That the award will be final and binding.

Judicial Settlement by the International Court of Justice

The International Court of Justice is the judicial organ of the United Nations and its procedures are governed by the ICJ Statute. The judges of this court are expected to recuse themselves, if they have been involved as counsel to one of the parties to the dispute, or in some other capacity. However, the mere fact that their state of origin is one of the parties will not on its own be grounds for recusal. In fact, a state may appoint an ad hoc judge, which is one of its nationals, to sit on the case.

Two types of proceeding may be brought before the ICJ:

• Contentious proceedings where there is a dispute between two (or more) state parties. In these cases, the court will hand down judgment which will be binding on the parties.

• Advisory opinions on questions of international law referred to it by the existing UN organs or its specialised agencies. These opinions are not binding.

Article 34 of the Statute provides that only states may be parties in cases before the ICJ, although the court may request organisations to place information before it. States must agree to the ICJ‟s jurisdiction.

Article 36(1) provides that the ICJ will have jurisdiction in all cases “which states in a dispute may agree to and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force”. States may submit an existing dispute to the ICJ once they have reached a special agreement to that effect. The court may also be able to exercise jurisdiction which is implied. This happens when one state has initiated proceedings and has agreed to the court‟s jurisdiction, while the other state has not expressed its consent, but has acted in a way from which consent may be inferred.

Furthermore, articles 36(2) provides that: “[T]he states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

• the interpretation of a treaty;

• any question of international law;

• the existence of any fact which, if established, would constitute a breach of an international obligation;

• the nature or extent of the reparation to be made for the breach of an international obligation.”

This article allows for states to accept the court‟s jurisdiction by way of declaration. It may be unconditional, but is usually subject to conditions and operates on the basis of reciprocity vis-à-vis certain states, on a given subject-matter and for a limited period of time.

Thus, a state which has made such a declaration may bring another state (which has accepted the same obligation) before the ICJ.

Lastly, the judgments of the court are binding only on the parties involved, in other words there is no precedent system.

MAY / JUNE 2020

QUESTION 1

Writing in 1909, John Foster extoled Suarez of Spain and Gentilis of Oxford as some of the luminaries of their time, through whose industry and skill international law principles were being churned out in Europe.1 Foster credited the rise of nation states in Europe, and the conclusion of the Peace of Westphalia as the key protagonists in bringing us sovereignty of states, the sanctity of treaties and diplomacy as we know these concepts today. These and other international law concepts subsequently found their way to the global south via the vehicles of colonisation and Christianisation. Fast forward to over a hundred years later, Foster's take on the birth and evolution of international law still prevails in mainstream Eurocentric legal scholarship.

Using Foster's assertions as a point of departure, write an essay in which you critically argue for or against Foster's view. [25]

The evolution of international law has been claimed to be owed to the Western legal players, just as the assertions of John Foster. It is because of this belief that the historical evolution of international law is an integral part of the phenomenon of state formation. This process owed its influence to the conditions that started to prevail towards the end of the 1500s in parts of Europe and which account for what is usually referred to as the Eurocentric nature of „early" international law.

The period from 1500 to 1648 is known for the emergence of modern Europe and was characterised by vigorous economic expansion, followed by social, political and cultural transformations. This period saw the emergence of Westphalian model. This is an international order consisting mainly or exclusively of independent sovereign States which exercised untrammeled authority within their respective territories and freely coordinated their mutual relations in accordance with their perceived self-interest on the basis of equality. It is a model which upholds state sovereignty and its major role in being a role player in international law. The sovereign equality of states and respect for their independence, ideas that developed between this period are still part of the fundamental principles of international law, and are enshrined in the UN Charter.

The period from 1648 to 1815 is described as the „most important event in modern history", called into being a new form of state referred to as the nation state. What emerged here was the concept of the nation as a political entity that was a voluntary association of a people under a common set of laws and represented by the same government. Connected to this historical notion of state formation were the aspirations of peoples or nations to independent statehood in the political and legal sense of the word. This led to the often interchangeable use of concepts such as „nation" and „state" in international law and in international relations.

The nineteenth century was also the age of the European conferences between the major powers. These contributed significantly to the development of rules governing the waging of war and the settlement of disputes. Through a network of international relations, the application of international law principles expanded and necessitated the academic study of state practice at institutions of higher learning.

The period from 1815 to 1914 saw the emergence of colonialism when African states were regarded as terra nullius. Colonial acquisitions were that while the presence of an indigenous population in these territories could prevent or limit the acquisition of private law rights, it could not prevent occupation of the territory for the purpose of asserting state sovereignty rights. Hence, any inhabited territory that was not the sovereign territory of a state, or a protectorate of a state, could become the object of occupation.

According to this theory, subjects of international law were only those states that exercised all rights of sovereignty and performed state functions in the same way as modern European states did. In Africa, although there were more or less distinct forms of political organisation, these were not sufficient to make it possible to speak of a real state. Therefore, they were not subjects of international law and their territory was ownerless in international law. Any recognised subject of international law could occupy Africa as terra nullius.

Before the outbreak of World War I the Hague International Peace Conferences of 1899 and 1907 played a great role in developing international law. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict. The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns. During World War I the peaceful settlement of disputes received considerable attention in articles 12, 13 and 15 of the League of Nations, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.

Key contributions by Africa to the development

Despite the unwritten nature of law in Africa, and of many of the historical sources, there is abundant evidence of formal relations at the highest governmental levels between the different peoples of West Africa in the pre-colonial period, and there is even some evidence of the existence of an inter-states system.[76]

The diplomatic interactions between African Kingdoms and European powers were mainly regulated by the principles of African customary law. For example, oaths and medicines were taken by parties in order to ensure the sanctity of contracts and treaties. The diplomatic immunity of accorded to representatives were based on customary rules of respect, care and hospitality. The Kingdoms of Benin and Kongo, exchanged ambassadors with Portugal.

Furthermore, slavery and colonialism contributed significantly to the relegation of African contribution to international law. Many of the principles that today guide diplomatic interaction; issues such as diplomatic immunity etc. were also applied during this period, such as the appointment of ambassadors, diplomatic immunity, the principle of sovereignty and territorial sovereignty, and principles of trade. Diplomats were appointed from the rank of nobles, and even slaves in some cases. These diplomats carried credentials such as fan, staff, and cane or wore special clothing to signify their rank. There were breaches of diplomatic rules in some cases.[77]

In large areas of Africa there had emerged broadly similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law, this customary law shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty.[78] Thus it seems that customary law in unity in diversity provided a bond between the

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76 Smith R “Peace and Palaver International relations in pre-colonial West Africa” 1971 Journal of African History 599–621.
77 Smith 1971 Journal of African History 599–621.
78 Elias T “Africa and the development of international law” 1972.

different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.[79]

The similarities of the West African to the West European system, especially as the latter was before the emergence of the nation state and of permanent diplomacy about the time of the Renaissance, are striking. Ambassadors were dispatched to represent their sovereigns abroad; their work, although it had its hazards, was within the protection of the law; treaties were concluded and solemn sanctions provided to uphold them since, in Africa as in Europe, 'treaties are made to be kept'.[80]

On the given set of arguments, John Foster‟s statement does not hold true. Africa‟s way of living having termed uncivilized could be the basis of the Eurocentric view. This does not however, mean that Africa was an object in the whole creation of international law. Africa has to take pride in its role of creating international law.

QUESTION 2

In Democratic Alliance v Minister of International Relations and Co-operation Case No 58755/17, delivered by the North Gauteng High Court on 30 July 2018, the court had to deal with the supposed immunity of Grace Mugabe, the wife of former president of Zimbabwe.

Answer the following questions based on the case above. Remember to substantiate your answer with other international law authorities.

(a) Define the concept of immunity in the context of international law. (3)

Immunity is the principle under international law which will prohibit a state from exercising jurisdiction over a matter that would ordinarily fall within its jurisdiction, either based on the identity of the person or entity involved (for example, a head of state) or the nature of the conduct in question.

(b) Discuss the various forms of immunity that can be enjoyed by various office bearers in international law. (7)

There are two forms of immunity, namely, personal and functional immunity.

v. Personal immunity This form of immunity provides complete immunity of the person of certain officeholders while they carry out important representative functions‟. It is absolute, covering both private and public acts committed by officials, even those committed prior to their taking office, but temporary, that is, it only applies in so far as the person holds the office in question. This form of immunity is provided for under both customary international law, as well as various treaties.

In the Arrest Warrant[81] it was held that these immunities also extend to certain holders of high-ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs.

vi. Functional immunity

79 Smith 1971 Journal of African History 599–621.
80 Smith 1971 Journal of African History 599–621.
81 Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment) ICJ Reports 2002.

This form of immunity relates to conduct carried out on behalf of a State. It is based on the notion that a state may not sit in judgment on the policies and actions of another state, since they are both sovereign and equal. Equally, when a person acts on behalf of a state, whether or not they are officials of that state, they may be able to rely on this form of immunity in respect of any criminal sanctions that would otherwise apply. However, in practice, functional immunity is more commonly raised in civil cases.

Different from personal immunity, functional immunity does not attach to all conduct performed by state officials, it only applies to conduct carried out within the official capacity, therefore, not absolute. It is also permanent and does not lapse when the official ceases to hold office because it is the conduct itself and not the office bearer that forms the basis of that immunity.

vii. Diplomatic immunity

In terms of section 3(1) of the DIPA, the Vienna Convention on Diplomatic Relations 1961 applies to all diplomatic missions and members of such missions in the Republic. The reason for this immunity is because of the functions which are performed by the diplomats (diplomats represent their state, protect the interests of their nationals, conduct negotiations between their government and the government of the host state, report on conditions in the host state and promote friendly relations). It could also, in certain circumstances, be difficult for the embassy to fulfil its protective function without immunity. The reason behind diplomatic immunity is therefore to enable the mission to perform its functions.

viii. Consular immunity

In terms of section 3(2) of the DIPA, the Vienna Convention on Consular Relations 1963 applies to all consular posts and members of such posts in the Republic. The reasoning behind consular immunity is the same as that behind diplomatic immunity. However, because a consulate has less status than an embassy, the extent of its immunity is reduced accordingly.

(c) In an essay, critically discuss how the court approached the claims by the Minister of International Relations that Grace Mugabe enjoyed immunity from prosecution in South African courts by virtue of her status as a spouse of a foreign head of state. (15) [25]

The Minister in the current case gave immunity to Grace under section 7(2) of Diplomatic Immunities and Privileges Act 37 of 2001 (DIPA). This section states that the Minister may in any particular case if it is not expedient to enter into an agreement as contemplated in subsection (1) and if the conferment of immunities and privileges is in the interest of the Republic, confer such immunities and privileges on a person or organisation as may be specified by notice in the Gazette.[82]

The issues before the court were as follows:[83]

1. Did Mugabe enjoy immunity for the alleged unlawful act perpetrated against Engels by virtue of being a spouse of a head of state?

2. If not, was the decision of the Minister to confer or grant immunity to Mugabe constitutional and lawful?

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82 Diplomatic Immunities and Privileges Act 37 of 2001.

83 Democratic Alliance v Minister of International Relations and Co-operation Case No 58755/17.

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The court quoted Arrest Warrant case in that the functions of Minister Foreign Affairs (this applies to the head of state as well as the head of government) are such that throughout the duration of his/her office he/she when abroad enjoys full immunity from criminal jurisdiction and inviolability. That immunity that inviolability protects the individual concerned against any act of authority of another state which would hinder him/her in the performance of his/her duties.[86]

In answering whether personal immunity applies to the spouse of the head of state, the court held that in a South African context personal immunity will be granted where:

iv. A customary norm that is consonant with the prescripts of the Constitution;
v. The prescripts of an international treaty which is constitutionally compliant; and
vi. National legislation which is constitutionally compliant. The decision that does not fall within one of the above categories will not withstand the test of legality, reasonableness and rationality.

The court further held that the customary international law provides the contextual background of Foreign States Immunities Act 87 of 1981 (FSI). The object of FSI is to determine the extent of the immunity of foreign states from the jurisdiction of the courts of the Republic and to give effect and some meaning to international customary law. The FSI continues to state that a foreign state shall be immune from the jurisdiction the courts of the Republic except as provided in this Act or in any proclamation issued thereunder which is then qualified with exceptions. One exception is found in section 6(a) that a foreign state shall not be immune from jurisdiction of the courts of the Republic in proceedings relating to the death or injury of a person (which is what Grace Mugabe was charged with).

In terms of this section 6(a) the former President Mugabe would not have enjoyed immunity because such personal immunity has officially been withdrawn by the current section. South African law has parted company with the customary international law and section 232 of the Constitution allows this.

Thus even if the Minister was corrected in her analysis that customary international law accorded immunity to Dr. Mugabe, her conclusion that this immunity has been extended was to our law was unlawful.[87] The court further held that by recognizing the personal immunity the Minister committed an error of law. An error which was fundamental and fatal. It held that such immunity had to be set aside. The court contended that the Minister had the authority to grant the immunity in terms of section 7(2) of DIPA, however, this authority has to be exercised in a manner that is constitutional and lawful.[88] The final decision was therefore, that Grace Mugabe was not immune from jurisdiction.

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84 Article 38(1)(b) of the Vienna Convention on the Law of Treaties.
85 Democratic Alliance v Minister of International Relations and Co-operation [17].
86 Democratic Alliance v Minister of International Relations and Co-operation [18].
87 Democratic Alliance v Minister of InternationRelations and Co-operation [40].
88 Democratic Alliance v Minister of InternationRelations and Co-operation [44].

QUESTION 3

Dondon Republic is a newly formed state that broke away from Namibia in the year 2015. It has a vibrant legislature, a struggling economy, an effective government and relates very well with its neighbours. Dondon Republic wishes to sign and accede to many international law treaties that it hopes will benefit its fledgling economy and enhance its international standing. Dondon Republic embraces strict Sharia law, and does not allow religious plurality. Although the territory has a constitution strikingly similar to the South African Constitution, its supremacy is only secondary to the prescripts of Sharia law. For instance, the Dondonians believe that if a man rapes a woman, such man must be compelled to marry that woman. They also believe that women should not be allowed to drive, nor should girls be allowed in public unless they are accompanied by a male relative. The education of girls is also frowned upon.

Dondon Republic wants to sign the following treaties:

the Convention on the Rights of the Child; the Convention for the Elimination of All Forms of Discrimination Against Women; the African Charter on the Rights and Welfare of the Child; and the Agreement Establishing the African Continental Free Trade Agreement (AfCFTA). The Dondon Parliament has mandated the Minister of Foreign Affairs to proceed with concluding the treaties above, and any others that would benefit the Republic of Dondon. However, Parliament cautioned the Minister not to sign treaties that would run counter to Sharia law.

In light of the above, answer the following questions:

(a) What international law remedy is available for the Minister to ensure that signing the above international instruments does not conflict with Dondon's Sharia law? (2)

Reservations

The international law remedy that is available for the Minister to ensure that signing the above international instruments does not conflict with Dondon‟s Sharia law is a reservation to a treaty. Article 2(1)(d) of the VCLT defines reservations as a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.

(b) The Minister upon signing, indicates that the State of Dondon will enter reservations on clauses that provide for: the equality of men and women; the right to education for girls; the right to marry and found a family. He explains that to sign the treaties without these reservations would place the State of Dondon in a precarious position, where it would be torn between its international obligations and its domestic duties flowing from Sharia law. Advise the Minister if these reservations can lawfully be made in international law. (10)

Lawful reservations

Reservations are guided by Article 19 of the VCLT which provides that a state may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

i. the reservation is prohibited by the treaty;

ii. the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or

iii. in cases not failing under subparagraphs (i) and (ii), the reservation is incompatible with the object and purpose of the treaty. Even if a state is allowed to exclude some provisions of a treaty to which it is party, it can only do so if the effect of the reservation is not to undermine the object and purpose of the treaty.

A treaty may altogether disallow the making of reservations or only allow reservations to certain provisions of the treaty. In the case of permissible reservations, a state may not formulate a reservation that cannot be reconciled with the object and purpose of the treaty. Of further importance is the fact that a reservation must be made at the time of signing, ratifying, accepting, approving or acceding to a treaty and not thereafter.

In the Genocide Convention[89] case it was held that if the reservation is not compatible with the object and purpose of the Convention, then the reserving state cannot be regarded as being a party to the Convention. The court also added that a state objecting to a reservation that it considers to be incompatible with the object and purpose of the Convention is entitled to consider the reserving state not to be a party to the Convention. For states with the opposite view, the reserving state will then still be considered to be a party to the Convention.

Acceptance by a state party of a reservation made by another state party causes the latter to be a party to the treaty in relation to the accepting state, if or when the treaty is in force between them. In the case of a contracting state objecting to a reservation, the objection will not preclude the entry into force of the treaty between the objecting and reserving state, unless the objecting state expressly indicated a contrary intention. An act expressing a state‟s consent to be bound by a treaty and containing a reservation will take effect as soon as one other contracting state has accepted the reservation. It must also be noted that reservations and objections can be withdrawn at any time, or as stipulated by the treaty itself.

Together with article 19 of the VCLT and the ICJ‟s advisory opinion, it should be clear that the general rule is that all treaties may be accepted subject to reservations. If the treaty is silent on the question of reservations, it may be assumed that reservations are allowed. Due to the fact that treaties are consensual and a proposed reservation is an offer, it stands to reason that the other parties to the multilateral treaty may do one of two things. Such states may either accept the reservation or reject the reservation made by another state.

Application to the facts

Dondon Republic wants to sign the following treaties: the Convention on the Rights of the Child; the Convention for the Elimination of All Forms of Discrimination Against Women; the African Charter on the Rights and Welfare of the Child; and the Agreement Establishing the African Continental Free Trade Agreement. The Minister upon signing, indicates that the State of Dondon will enter reservations on clauses that provide for: the equality of men and women; the right to education for girls; the right to marry and found a family.

From the names of the treaties to be concluded and the reservations by Dondon Republic the purpose and object of the treaties in question will be defeated. Dondon Republic does not believe in equality and yet want to be a party to the Elimination of All Forms of Discrimination Against Women treaty, reserving on the equality of men and women will defeat the purpose and object this treaty. Further, Dondon Republic wants to reserve on the right to education for girls of which the Convention on the Rights of the Child treaty aims to protect such rights. Lastly, the reservation on the

89 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion) ICJ Reports 1951 (Genocide Convention).

right to marry and found a family will also defeat the purpose of the Agreement Establishing the African Continental Free Trade Agreement.

(c) Write brief notes on the invalidity of treaties in general. (13) [25]

Invalidity of treaties in general

The invalidity of a treaty, or of the consent of a state to be bound by a treaty, may only occur through the application of the VCLT. The validity of a treaty can be contested on the basis of error, fraud, corruption or coercion of a state representative.

An error will invalidate the consent to be bound by a treaty if it relates to a fact or situation that was assumed by the consenting state at the time and which formed an essential basis of that state‟s consent to be bound. However, this will not apply if the state contesting the validity contributed by its own conduct to the error, or, if under the circumstances, the state should have known about a potential error.

Consent to be bound by a treaty will also be invalidated if the consent was induced by the fraudulent conduct of another state or procured through the corruption or coercion of a state representative.

The following are the circumstances under which a party may raise invalidity of a treaty:

vi. A state may invoke error if it assumed that a fact or situation which was material and formed the basis of consent when the treaty was concluded and it did not itself contribute to the error or the circumstances were not suspicious.

vii. A state may invoke fraud if it was induced by fraudulent action of other negotiating states to conclude the treaty.

viii. A state may invoke corruption if there was direct or indirect corruption of the state‟s representative by another negotiating state.

ix. A state may invoke coercion where there was coercion of a representative by acts or threats against the representative by any person.

x. A state may invoke force if there was coercion of a state by threat or use of force contrary to the principles of international law in the UN Charter.

A treaty will be rendered void in two instances: first, if the conclusion of the treaty has been induced by the threat or use of force in violation of the principles of international law embodied in the UN Charter and secondly, if at the time of its conclusion it was in conflict with a peremptory norm of general international law. Article 53 of the VCLT defines a peremptory norm (jus congens) as a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

QUESTION 4

Write short notes on the following:

(a) The forms of jurisdiction that a court could rely on under international law. 10)

The principle of territoriality

In terms of the principle of territoriality all crimes committed or alleged to have been committed within the territorial jurisdiction of a state may come before the municipal courts and the accused if convicted may be sentenced. This is the case even when the offenders are foreign citizens. This

principle is „universally recognized", and, as a matter of practice, states routinely assert jurisdiction over criminal acts that occur within their territory and over the persons responsible for such acts.

The nationality principle

In terms of the nationality principle, a state may choose to exercise jurisdiction over crimes committed abroad when they are commited by nationals of that state. The link or connecting factor between the state and the conduct in question is the nationality of the perpetrator.

Passive personality

In terms of the passive personality principle, a state may choose to exercise jurisdiction over extraterritorial crimes committed, or intended to be committed, against their nationals (and in some instances their ordinary residents). Here, the link between the state and the conduct in question is the nationality of the victim of the crime in question. This principle is in a sense the „reverse of the coin" of the nationality principle. In the Arrest Warrant case it was held that passive personality jurisdiction, for so long regarded as controversial, is now reflected not only in the legislation of various countries and today meets with relatively little opposition, at least so far as a particular category of offences is concerned.

The protective principle

A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.

The effects principle

In terms of this principle, a state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.

Universal jurisdiction

Universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

(b) The methods of peaceful settlement of international disputes between states under international law. (15) [25]

Negotiation

The ICJ has emphasised that the parties „must negotiate with the aim of arriving at an agreement, and not merely go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement." Negotiations must be a genuine attempt to engage in discussions.

Mediation

In this instance, the states are assisted through the intervention of a third party (the mediator). The mediator is actively involved in conveying each party"s proposals and ideas, and looking for a solution to the problem. Mediation is also known as „good offices.

Conciliation

In this instance, a commission set up for that purpose, either permanently or an ad hoc basis, and it assists the parties to the dispute. This is a formalised form of mediation and it is usually decided upon through a bilateral arrangement. See the prescribed textbook for a number of such treaty examples.

Inquiry

Article 9 of the 1907 Hague Convention for the Pacific Settlement of Disputes provides that where the parties who have not been able to come to an agreement by means of diplomacy should, as far as circumstances allow, institute an international commission of inquiry to facilitate a solution of these disputes by elucidating the facts by means of an impartial and conscientious investigation. An important example, is article 34 of the UN Charter, which provides that the Security Council is to investigate disputes which are „likely to endanger the maintenance of international peace and security."

Arbitration

Arbitration has been defined by the International Law Commission as the procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted.

Parties must agree on:

- The identity of the arbitrators
- The content of the legal question(s)
- What rules of law would apply to the dispute (they are not necessarily rules of public international law)
- The time frame within which the award must be made
- That the award will be final and binding.

Judicial Settlement by the International Court of Justice

The International Court of Justice is the judicial organ of the United Nations and its procedures are governed by the ICJ Statute. The judges of this court are expected to recuse themselves, if they have been involved as counsel to one of the parties to the dispute, or in some other capacity. However, the mere fact that their state of origin is one of the parties will not on its own be grounds for recusal. In fact, a state may appoint an ad hoc judge, which is one of its nationals, to sit on the case.

Two types of proceeding may be brought before the ICJ:

- Contentious proceedings where there is a dispute between two (or more) state parties. In these cases, the court will hand down judgment which will be binding on the parties.
- Advisory opinions on questions of international law referred to it by the existing UN organs or its specialised agencies. These opinions are not binding.

Article 34 of the Statute provides that only states may be parties in cases before the ICJ, although the court may request organisations to place information before it. States must agree to the ICJ"s jurisdiction.

Article 36(1) provides that the ICJ will have jurisdiction in all cases "which states in a dispute may agree to and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force". States may submit an existing dispute to the ICJ once they have reached a special agreement to that effect. The court may also be able to exercise jurisdiction which is implied. This happens when one state has initiated proceedings and has agreed to the court‟s jurisdiction, while the other state has not expressed its consent, but has acted in a way from which consent may be inferred.

Furthermore, articles 36(2) provides that: "[T]he states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

- the interpretation of a treaty;
- any question of international law;
- the existence of any fact which, if established, would constitute a breach of an international obligation;
- the nature or extent of the reparation to be made for the breach of an international obligation."

This article allows for states to accept the court‟s jurisdiction by way of declaration. It may be unconditional, but is usually subject to conditions and operates on the basis of reciprocity vis-à-vis certain states, on a given subject-matter and for a limited period of time.

Thus, a state which has made such a declaration may bring another state (which has accepted the same obligation) before the ICJ.

Lastly, the judgments of the court are binding only on the parties involved, in other words there is no precedent system.

OCT / NOV 2019

QUESTION 1

"The existence of a widespread customary law was noticed by early European visitors to Africa, in particular by the Portuguese. Traders enjoyed, for example, the protection of law for the unwritten contracts, based on oaths and 'medicine', which they made with the local inhabitants. Conversely, these European traders resented the application of West African law under which the property of a dead colleague, or their ships gone aground along the coast, were forfeit to the local ruler. Thus it seems that customary law, this 'unity in diversity', provided a bond between the different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated."

- Robert Smith, 'Peace and palaver: International relations in pre-colonial West Africa' Journal of African History (1973).

Based on the quote above, explain how African customary law shaped the following practises in pre-colonial Africa:

a) **Define International law (2)**

In broad terms, international law is the law between states (countries). In other words, international law regulates the external relations between states. International law also involves relationships between states and international organisations as secondary subjects of international law and also a relationship between international organisations inter se.

b) Provide a brief description of how modern international law often is presented as a European creation (8)

Modern international law presents international law as an idea that mainly originates from Europe. There is no reference to pre-colonial Africa and Asia‟s involvement and contributions to international law. According to modern international law, the history of international law can be divided into 4 periods:

1500-1648

This epoch was characterised by Portuguese expansion into Africa, India and the East Indies. They aimed to establish a monopoly over trade around the African coast and in the Indian Ocean. Their expansion was facilitated by their circumnavigations of Africa. This was achieved gradually over roughly a hundred years through force. Slaves were abducted from Africa to render free labour. They inevitably found new „business‟ partners in Portugal and Spain. Other European countries followed take part in this practice. Consequently, the need for public international law arose, so they could amicably rob Africa of its raw materials, kidnap able young and able-bodied Africans through the Atlantic to Europe.
1648-1815

This period saw the emergence of the Westphalian model. This is an international order consisting exclusively of independent sovereign states. These states exercised untrammeled authority within their respective territories and freely coordinated their mutual relations in accordance with their perceived self-interest on the basis of equality.

1815-1914

This period was among other things known for the Berlin Conference of 1884, called by Bismarck at the request of Portugal for managing relations among increasingly colonial powers in Africa. This laid a legal foundation for colonialism. Of the 14 countries attending the conference, Great Britain, Portugal, France and Germany were already in control of certain coastal areas. The conference was about agreement on the rules that would determine the further acquisition of territory in Africa, which was deliberated without the participation of African representatives. International agreements and treaties were fixed after the Berlin Conference.

In 1885 a recognised subject of international law could occupy Africa as terra nullius the colonial power to gain control over the territory and establish an effective administration, as was required by the Berlin Act. The inhabitants had to sign away their rights and control thereof. It is claimed that, since the African signatories were not real subjects in international law the treaties concluded with African rulers were not real treaties in international law and therefore not enforceable in international law. In the understanding of the court, the treaties

assumed the nature of treaties in international law with the result that non-observance of a treaty would amount to a breach of the treaty in international law

Post-World Wars 1 and 2

Note should be taken of two other historical events shortly before the outbreak of World War I. The Hague International Peace Conferences of 1899 and 1907. Their legacy in the years to come would feature strongly in three areas of concern for international law – namely, peaceful settlement of disputes, disarmament, and the law of armed conflict. The Hague conferences produced the first, landmark codification of international law principles, inspired by humanitarian and peace concerns, but had no mitigating effect on Britain"s scorched earth policy and the use of concentration camps in its war against the Boer Republics in South Africa (1899–1902). Nor could it prevent the outbreak of World War I.

During World war I the peaceful settlement of disputes received considerable attention in articles 12, 13 and 15 of the League of Nations, which provided for arbitration and judicial settlement as peaceful means of dispute resolution. Judicial settlement was given further substance in article 14, which made provision for the establishment of the Permanent Court of International Justice (PCIJ), the predecessor of the current International Court of Justice (ICJ). The PCIJ was inaugurated in 1922 and dissolved in 1946.
The rise of international organisations

International organisations have become key actors in international society over the past two centuries, and are now considered subjects of international law in their own right. There is hardly a human activity which is not, to some extent, governed by the work of an international organisation. The establishment and proliferation of international organisations is generally attributed to the changing nature of international society, which has seen a marked increase in the degree of interactions between states, as well as the complexity of issues involved. In such circumstances, the traditional bilateral and ad hoc relations between states are said to have become outmoded, presenting a need to devise new forms and institutions of organisation. These developments form part of a progressive narrative charting the ongoing transformation of international law itself, from a law of coexistence to co-operation (and perhaps, community).

These periods refer to European scholars, European states and ideas as the foundation of the theories and practice of international law. These include ideas such as state sovereignty, states as subject of international law, diplomatic immunity, and international organisations

c) With reference to Robert Smith's article, discuss the way in which African customary law shaped the practice of international law in pre-colonial Africa. (15) [25]

Elias and Smith, these authors clearly explored the extent to which pre-colonial African Kingdoms (Benin, Kongo, Oyo, Mossi etc.) engaged in what is today referred to as international law and relations. These Kingdoms dealt with European powers on equal footing, and negotiated trade and diplomatic matters in a sophisticated fashion.

Despite the unwritten nature of law in Africa, and of many of the historical sources, there is abundant evidence of formal relations at the highest governmental levels between the

different peoples of West Africa in the pre-colonial period, and there is even some evidence of the existence of an inter-states system. (Smith 599–621).

It must be emphasised that the diplomatic interactions between African Kingdoms and European powers was mainly regulated by the principles of African customary law. For example, oaths and medicines were taken by parties in order to ensure the sanctity of contracts and treaties. The diplomatic immunity of accorded to representatives were based on customary rules of respect, care and hospitality. The Kingdoms of Benin and Kongo, exchanged ambassadors with Portugal.

Slavery and colonialism contributed significantly to the relegation of African contribution to international law. Many of the principles that today guide diplomatic interaction, issues such as diplomatic immunity etc. were also applied during this period, such as the appointment of ambassadors, diplomatic immunity, the principle of sovereignty and territorial sovereignty, and principles of trade. Diplomats were appointed from the rank of nobles, and even slaves in some cases. These diplomats carried credentials such as fan, staff, cane or wore special clothing to signify their rank. There were breaches of diplomatic rules in some cases.

The capacity to engage in foreign affairs usually vested in the King. Although in theOyo Empire, the King may consult with the council of chiefs. Here, students have to show examples on how well they have grasped the topic.

In large areas of Africa there had emerged broadly similar rules of customary law, which makes it possible to speak of the existence of a universal body of principles of African customary law that is not essentially dissimilar to the broad principles of European law, this customary law shares with customary international law the characteristic that its validity does not depend upon any theory of sovereignty.[90] Thus it seems that customary law in unity in diversity, provided a bond between the different states and peoples of West Africa, and a form of international law by which their relations with each other could be regulated.[91]

Treaties in West Africa were entered into solemnly and were usually regarded as binding and sacred. African customary law shares with customary international law acceptance of the principle pacta servanda sunt as basis for assurance of a valid world order.[92] Neither on the coast nor in the savannah nor even in the deepest forest did these peoples live in isolation from each other. It may show that these relations were generally conducted according to an indigenous system and in obedience to a customary law, both of which were widely accepted, comparable in many ways to what obtained in western Europe and elsewhere, and capable of assimilating without being essentially changed by external influence.[93]

The similarities of the West African to the West European system, especially as the latter was before the emergence of the nation state and of permanent diplomacy about the time of the Renaissance, are striking. Ambassadors were despatched to represent their sovereigns abroad; their work, although it had its hazards, was within the protection of the law; treaties

90 Elias T 'Sovereignty within the Law' 1965 New York 210-22.
91 Smith 1971 JSTOR 599–621
92 Elias1965 New York I965 210-22.
93 Smith 1971 JSTOR 599–621.

were concluded and solemn sanctions provided to uphold them since, in Africa as in Europe, 'treaties are made to be kept'.[94]

QUESTION 2

In April 2016, the African Union Peace and Security Council (PSC) received the final report of the fact-finding mission of the African Commission on Human and Peoples' Rights to Burundi. The report highlighted that: "Government security personnel and affiliated groups perpetrated wide range of violations. Not only that these violations were perpetrated repeatedly but also they overtime have become part and parcel of the response of security forces to the violent expressions of opposition to the government. The violations have thus been pervasive and systematic".On the basis of this report, the PSC recommended the deployment of 5,000 peacekeeping troops to Burundi, a plan that was later rejected by the African Union Assembly.

Based on the scenario above, answer the following questions:

a) In terms of Article 4 paragraph h of the African Union Constitutive Act, list and briefly explain the grounds for intervention in the affairs of its member states. [10]

Article 4(h) of the Constitutive Act of the African Union (2000) provides as follows: The Union shall function in accordance with the following principles: the right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.

The AU can intervene in respect of grave circumstances such as war crimes, genocide and crimes against humanity. This was motivated in large part by dissatisfaction with the current international legal regime, which had failed to prevent atrocities in Africa during the 1990s.

War crimes include killing of protected persons; mistreatments committed against any persons such as torture, mutilation, sexual violence, attacks on buildings dedicated to religion, education, art and science and historical monuments.

Crimes against humanity include widespread attack against civilian population such as murder, enslavement, enforced disappearance of persons, deportation and forcible transfer of population.

Genocide includes killing members of a particular group, causing bodily harm to members of a group, physical destruction of a group.

b) If you agree that the AU can intervene through the use of force, discuss whether such intervention requires Security Council authorisation. [10]

The UN generally prohibits the use of force. There are exceptions under article 51 of the UN Charter (individual or collective self-defence if an armed attack occurs against a member state). Such action must be authorised by the Security Council under Chapter VII. Article 53 of the Charter notes that regional organisations or agencies must first obtain authorisation of the Security Council before undertaking enforcement actions.

However, if the intervention takes place by invitation – that is, consent, of the member state – the need to seek prior Security Council authorisation falls away, since the invitation itself will constitute sufficient justification for the intervention. However, in such circumstances, the invitation must come from a government whose status and legal authority to seek assistance are not in dispute and the consent itself is clear and unambiguous.

Note also that consent as a justification for intervention cannot be relied upon if the action taken is directed against the government itself. For instance, this will be the case where the actions of the

94 Smith 1971 JSTOR 599–621.

government of the territorial state are the cause of the humanitarian crisis and the AU is forced to act against that government under article 4(h) of the AU‟s Constitutive Act.

A related issue is whether member states of the AU‟s Constitutive Act, by virtue of their membership, have given advance consent for the kind of action contemplated in article 4(h). There are two possible responses to such an interpretation. The one is that the lawfulness and validity of an invitation (consent) (to which the AU has a right to respond) can only be determined at the time and in the circumstances of the crisis; advance consent to intervene in article 4(h) crises sometime in the future makes such an assessment impossible and disregards the sovereign right of the territorial state to determine for itself the cause of action in the actual circumstances of the situation. The other is that the AU may then rely on advance consent to exempt itself from seeking and obtaining prior Security Council authorisation for enforcement action under article 4(h).

This is certainly not commensurate with the overall purpose of the UN Charter‟s legal regime on the use of force – in particular, that of article 53. In general, the powers and functions of the AU, especially those under article 4(h) of the AU‟s Constitutive Act, cannot be interpreted with disregard for article 103 of the UN Charter. This provision states: In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

Article 4(h) can be seen as advance consent given by member states but it can be argued that since the AU has committed itself to international law, it still has to get authorisation before intervention. In conclusion, the AU has to get authorisation from the UN before intervening in Burundi

c) Provide an opinion on the importance of AU intervention in Burundi. [5]

The commitment to its principles obligates the AU to intervene on the grounds of Responsibility to Protect in order to protect civilians. There is an obligation on the part of the AU to intervene based on Article 4(h), especially on the grounds on crimes against humanity, which was highlighted in the report by the African Commission. The AU should approach the UNSC to get an authorisation to act in this regard.

QUESTION 3

The state of Qwaqwa is a prosperous, ethnically almost homogenous country nestled in the east equatorial region of Africa. Its economy has been growing steadily over the years, attracting economic migrants from some of the neighbouring states with which it shares its borders, such as the Republics of Matafeni, Gondwana and Yorika. These two latter republics have been battling political instability and have over the years increasingly implemented austerity measures as their economies dwindled. Naturally, these developments also led to an increase in anti-government protests and other situations of violence. In March 2018,Moses Agrizzi, a leader of the Yorika Revolutionary Brigade clandestinely entered the Republic of Qwaqwa and detonated a bomb at the Embassy of the Republic of Yorika. The bomb-blast killed 44 people and injured many others. Agrizzi's revolutionary forces control over half of the southern part of Yorika, where they control opium fields used to produce drugs to finance their conflict with the Yorika Government. The opiods they produce are exported to other countries, including the Islamic State of the East and the neighbouring Republic of Godwana. The proceeds are banked safely with the Bank of the East, headquartered in the Islamic State of the East.

During that week of terror, Agrazzi and his revolutionary allies also launched rocket-propelled grenades from within Qwaqwa territory, hitting targets inside Yorika and Matafeni. As the uncertainty and violence continued throughout the northern province of the Qwaqwa Republic. Agrizzi's forces also kidnapped a group of school girls, to be used as sex slaves.As the violence and

the state's response to it intensified, Agrizzi decided to flee Qwaqwa to the Islamic State of the East, via the Comoros. Whilst transiting the Comoros, he was arrested by the security agents there for possession of cannabis.

With reference to case law, advise the Government of the Comoros if it can claim jurisdiction over Agrizzi. Advise further whether there are any other competing claims of jurisdiction in this case.

The different jurisdictional links:

a) The principle of territoriality.

The state on whose territory the offending conduct took place has jurisdiction over that particular matter.

b) The principle of nationality/active personality.

The court of a particular state will exercise jurisdiction over a matter where the perpetrator is its national; even when the offence took place abroad.

c) The principle of passive personality.

The nationality of the victim is central in this case. Here the court of a state will exercise jurisdiction over a matter because the victim of the offending conduct is a national of that particular state; even where the offence took place abroad.

d) The protective principle.

Here the protection of an interest of that particular state will clothe the national court with jurisdiction.

e) The effects principle.

A state has jurisdiction to prescribe law with respect to conduct outside its territory that has or is intended to have substantial effect within its territory.

f) The principle of universality (universal jurisdiction).

Here the state that eventually prosecutes the offender has not causal link with the crime or the accused (or even the victim), save that the nature of the acts complained of is so egregious that it is an affront to all of humanity, and the state proceeds with prosecution as an agent of humankind. The Perpetrator is regarded as an enemy of humankind as a whole. Prosecution of the crime is open to any state.

Application to the facts Comoros:

• Agrizzi is passing through Comoros. Comoros can claim jurisdiction over the possession of cannabis. This will be territorial jurisdiction.

• Comoros has no other connecting link to either the crime or the victims. However, Comoros might be able to claim universal jurisdiction over Agrizzi in relation to one crime, that of kidnap of school girls to use as sex slaves. If the violence is characterised as a non-international armed conflict (NIAC) (the so called civil war), then the crime committed would be a war crime. If, however, the violence does not meet the threshold of NIAC, then the offending conduct would be classified as a crime against humanity. In either of these cases, the crime committed would fall within the class of crimes for which any state as an agent of all humankind can exercise universal jurisdiction.

Republic of Qwaqwa:

• Territoriality – the crimes of abduction of school girls for use as sex slaves occurred on the territory of Qwaqwa. So did the crime of bombing the embassy which killed 44 people; and the launch of the rockets that pummelled the state of Yoyika. All these are connecting factors that entitle the state of Qwaqwa to claim territorial jurisdiction over Agrizzi.

• Passive personality – the sex slaves are nationals of Qwaqwa, therefore the state can claim jurisdiction on this extra ground, even though the kidnapper and his rebel collaborators are foreigners from neighbouring Yoyika.

Republic of Yoyika:

• Nationality – Agrizzi is a national of Yoyika, therefore the Republic of Yoyika can claim jurisdiction on the basis of nationality for the crimes of launching rockets to bomb targets inside Yoyika (even though the act itself was commenced externally); for the drug farm and drug production; for the bombing of its embassy; and for laundering money through its banking system.

• Passive personality – Some of the victims of Agrizzi's crimes are nationals of Yoyika. Therefore, the state of Yoyika can claim jurisdiction over the crimes of rocket bombing of their property which killed Yoyika nationals.

• Territoriality – for the drug farms and drug production; and for the laundering of the proceeds of drug peddling that took place on Yoyika territory.

Republic of Matafeni:

• Passive personality – the rocket shelling, although it commenced in the Republic of Qwaqwa and terminated in the Republic of Yoyika, it managed to kill nationals of Matafeni as well. That nationality link (passive personality) would bestow jurisdiction upon the Gondwana of Matafeni.

Republic of Gondwana:

• Effects principle - The drug farms produce opioids which are exported using a drug route that goes through Gondwana. This invokes the ground of jurisdiction known as the effects principle. Even though the opioids are produced outside Gondwana, their impact is felt in the economy and social fabric of the Republic of Gondwana. It can therefore claim jurisdiction based on that link.

Islamic State of the East:

• Effects principle – in similar fashion to the jurisdiction enjoyed by the Republic of Gondwana.

QUESTION 4

a) **With reference to authority,write a brief narrative on the sources of International law (10)**

The traditional sources of international law are highlighted in article 38 of the Statute of the International Court of Justice. This article provides that:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply :

a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b) international custom, as evidence of a general practice accepted as law;

c) the general principles of law recognized by civilized nations;
d) Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The general practice seems to be that there is no strict hierarchy when it comes to the sources. However, the "subsidiary means" on (d) suggests that the other sources are secondary to the first two mentioned, treaty and custom.

The traditional sources are therefore:
i. Treaties;
ii. Customary international law; iii.
iii. General principles of law
iv. Judicial decisions and the teachings of publicists.

b) Answer True or False to the following questions

1. **One of the requirements of statehood is that a state must demonstrate the existence of a homogenous, non-normadic population.**
   FALSE
2. **South Africa is a party to the Vienna Convention on the Law of Treaties (VCLT).**
   FALSE
3. **To conclude treaties under international law, full powers are required. For a young democracy such as South Africa, it shall suffice that the person representing South Africa is a member of the Judicary.**
   FALSE
4. **The primary sources of international law are judicial decisions of national courts and the teachings of the most highly qualified publicist.**
   FALSE
5. **The international Criminal Court can exercise jurisdiction over grave breaches whenever territorial, nationality, passive personality or protective interest jurisdiction exists.**
   FALSE
6. **Diplomatic immunity under international law derives its rules from diplomatic protection.**
   FALSE
7. **In 2014, the African Union established its own international criminal court via the Malabo Protocol, which provides for immunity of heads of state. This immunity clause is in line with both international customary law and case law.**
   FALSE
8. **Individuals (natural persons) are subjects of international law.**
   FALSE
9. **In terms of article 38(1) of the Statute of International Court of Justice, international customary law is made up of a general practice that is accepted as a legal obligation.**
   TRUE
10. **In terms of the monist theory regarding the incorporation of international law into the municipal legal system, international law and national law are seen as part of a single legal system. No 'acts of transformation' are necessary.**

TRUE

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REVISION STUDY PACK

SECTION A - QUESTIONS AND ANSWERS

TRUE AND FALSE

Indicate whether each of the following statements is true or false. You must substantiate your choice in each instance.

There are two requirements which must be present for the formation of a customary international law rule: *jus cogens* and *opinio juris*.

False - The requirements are *usus* and *opinio iuris* , *Jus cogens* is a norm from which no derogation is permitted

The United Nations may exercise diplomatic protection over its agents and it may institute an action on their behalf.

True - This was confirmed by the ICJ in *Reparation for Injuries Suffered in the Service of the United Nations* 1949 ICJ Rep. By finding that the UN could in fact do both, the ICJ recognised that it was a subject of international law enjoying international legal personality.

Where a foreigner violates the rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner on the basis of the principle of nationality.

False -The basis of nationality is applied where the alleged perpetrator is a national of the state This scenario depicts the basis of jurisdiction known as passive personality

It was accepted by the court in *S v Banda* 1989 4 SA 519 (Bop) that recognition by other states is necessary before an entity may become a state.

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False - In this case the court preferred the declaratory theory – ie only the four objective requirements in the Montevideo Convention must be met for an entity to be considered a state

The ICTY is a permanent international criminal tribunal which functions as the judicial arm of the United Nations.

False -The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by Security Council Resolution 827/1993. It was set up in terms of article 41 of the UN Charter. It is an *ad hoc* Tribunal established for temporary specific purposes

In order for an entity to qualify as a state, it must have a permanent population amongst other requirements).

True: The requirements are listed in the Montevideo Convention.

If a state is recommended for UN membership by the Security Council, the General Assembly must decide on admission of that state by a simple majority of the voting members.

True:

In terms of article 38(1)(d) of the ICJ Statute, international conventions are subsidiary means for the determination of the rules of law.

False: Article 38(1)(d) of the ICJ Statute lists judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

A *jus cogens* norm of international law is a peremptory norm from which no derogation is permitted.

True, see Article 53 of the Vienna Convention.

Article 4(2) of the UN Charter prohibits the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations.

False: Article 2(4) deals with the prohibition of the threat or use of force against the territorial integrity of another state; whilst Article 4(2) deals with the role of the General Assembly and the Security Council in the admission of a state into the United Nations.

In terms of the 2001 ILC Draft Articles on the Responsibility of States for internationally wrongful acts, necessity may never be invoked as a ground for precluding wrongfulness.

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False: In terms of Article 25(1) of the Draft Articles provides that necessity may only be invoked as a ground for precluding wrongfulness in the act complained of was the only way for the state to safeguard an essential interest against a grave and imminent peril, and if the act did not seriously impair an essential interest of the state, or of the international community as a whole.

In the *Bosnia Genocide* case the ICJ held that for the conduct of private persons to be attributable to the state, that conduct must be based on general instructions given to such persons by the state.

True: See para 406 of the ICJ judgment – "a State's responsibility can be incurred for acts committed by persons or groups of persons — neither State organs nor to be equated with such organs — only if, assuming those acts to be internationally wrongful, they are attributable to it under the rule of customary international law reflected in Article 8 cited above (paragraph 398). This is so where an organ of the State gave the instructions or provided the direction pursuant to which the perpetrators of the wrongful act acted or where it exercised effective control over the action during which the wrong was committed".

In terms of article 31 of the 2001 ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

True

In terms of international law, a state is under a legal obligation to exercise diplomatic protection on behalf of a national who has been injured abroad.

False: The state has a right, rather than a duty.

The ICJ has competence to decide contentious cases between states.

True

In terms of the UN Charter, the General Assembly of the United Nations has a primary responsibility for the maintenance of international peace and security.

False: Article 24(1) of the UN Charter confers that responsibility on the UNSC.

The right of state to act in self-defence is provided for in article 51 of the UN Charter.

True

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The principle of territoriality entails that a state has jurisdiction over acts committed in its territory.

True:

The International Criminal Court has universal jurisdiction.

False: The Rome Statute does not provide for universal jurisdiction.

In terms of the 1981 Foreign States Immunities Act, foreign states enjoy absolute immunity from the jurisdiction of South African courts.

False

LONG QUESTIONS

INTERNATIONAL LAW AND NATIONAL LAW

Write a brief paragraph discussing the differences between international law and national law. [10]

In international law there is no legislator, whereas in national law there is a complete legislative process.
There is no court to enforce international law, and there is no precedent system either. States are the judges in their own cases. In national law, there is a fully developed judiciary which applies a precedent system, as well as the principle of *nemo iudex in sua causa*.
There is no executive to enforce judgments in international law, whereas in national law there is a complete executive machinery for enforcing judgments.
The subjects of international law are generally states and international organisations, whereas in national law they are individuals or legal persons.

SOURCES OF INTERNATIONAL LAW

Write an essay in which you discuss the term "customary international law". In your essay you must define "customary international law", describe the requirements for its formation (with reference to applicable case law) and explain whether and to what extent customary international law is part of South African law. [25]

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Article 38 of the Statute of the ICJ provides that in settling disputes the court shall apply “international custom, as evidence of a general practice accepted as law”. Custom is therefore a practice followed by states because they feel legally obliged to behave in such a way.

There are two main requirements for the creation of a customary international rule:

1) Usus (settled practice)
2) Opinio iuris (a sense of obligation on the part of the states)

***Usus* is constant and uniform usage as defined in the *Asylum* case. In this regard:**

- The practice need not be “universal”, therefore widespread acceptance by states would be sufficient (*Fisheries Jurisdiction* case).
- Usage can develop between two, or only a few states to form a local or regional custom (*Case Concerning Right of Passage over Indian Territory*, contrary to the *Asylum* case).
- The number of states is not as important as the identity of those states. In every activity, some states’ actions are more important than others (eg the US and USSR played an important role in developing the law of outer space).
- The number of repetitions necessary to create a custom depends on the nature of the rule involved and the number of states affected.
- The duration for which the states’ practice must have persisted likewise depends on the nature of the usage. For example, in *S v Petane* the court cited a GA Resolution as a customary rule which developed with little practice (the Resolution concerned the law of outer space).
- The practice must be characterised by a degree of uniformity, or rather substantial compliance (*Nicaragua v USA*). It is sufficient that the conduct of states is generally consistent with a rule. An inconsistency should be treated as a breach of the rule, rather than an indication that a new rule has been created.
- According to the rule of the persistent objector, a state isn’t bound if it persistently objects to the practice while the custom was being developed (*Anglo-Norwegian Fisheries* case, *North Sea Continental Shelf* case).

Opinio iuris is the second requirement which must be present before the usage can become a binding rule of customary international law. As was stated in the *North Sea Continental Shelf* case, the states concerned must feel that they are conforming to what amounts to a legal obligation. In other words, they must feel that if they did not follow the usage, they would be breaking international law and would have to bear the consequences for not complying with it.

In terms of section 232 of the Constitution, “customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”. From this provision it is clear that customary international law is South African (domestic) law and as such it will be applied directly. If the alleged rule meets the requirements of *usus* and *opinio iuris*, the court will take judicial notice of it

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and apply it. Only two conditions must be met: the rule must not contradict the Constitution, and it must not contradict an Act of Parliament. Common law rules and judicial decisions are subordinate to or at least on par with customary international law.

STATEHOOD AND REGOGNITION

In November 2012, the United Nations General Assembly passed a resolution changing the status of Palestine from an "observer entity" to a "nonmember observer state" within the United Nations system. Susan Rice (the US Ambassador to the UN) told the Assembly: "This resolution does not establish that Palestine is a state". You have been tasked by the South African government to write a legal opinion on whether or not Palestine has become an independent state in light of the requirements for statehood in international law. [25]

For an entity to qualify as a state, it must meet all the requirements for statehood. The Montevideo Convention of 1933 provides the following definition:

> *"The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states".*

Permanent population

The "permanent population" requirement does not mean that there is a required minimum number of people. Furthermore, the fact that a population is nomadic does not affect statehood adversely, as was pointed out by the court in the *Western Sahara* case. What is important for the purpose of the "permanent population" requirement is that the population lives in accordance with an organised, recognisable social and political structure with a clear chain of command.

Defined territory

It is important for a state's territory to be defined. There is no required minimum size. This requirement does not imply that the territory must have undisputed borders. Israel serves as an example: despite the ongoing dispute with Palestine, Israel still satisfies the requirements for statehood. Furthermore, the territory need not necessarily form one single unit. What is important is that the state must be sufficiently homogenous to be able to perform its function of government effectively (eg USA and Alaska separated by Canada; East and West Pakistan were separated by India). In other words, there must be a stable community within an area over which its government has control. If the territories are so dispersed that such control cannot be exercised in all of them, statehood will not be granted.The case of *Van Deventer v Hancke & Mossop* is an example of a case where a community of people, ruled by a particular government, qualified as a state despite the fact that it had no territory.

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Effective government

The entity must have a government that is independent of any other authority, and it must have legislative and administrative competencies.

Brownlie suggests some guidelines which can be used to assess a government's effectiveness:

1. Does it have its own executive organs?
2. Does it conduct relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

If the answer to these questions is yes, that is an indication of an effective government.

Capacity to enter into relations with other states

This requirement means that a state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. The fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of its statehood (*R v Christian*). What is important is the presence of external sovereignty. This requirements is also closely linked to the issue of recognition: if the other members of the international community refuse to recognise a state and to enter into relations with it, that state will for all practical purposes be deprived of its capacity to enter into relations with other states.

Recognition

The "requirement" of recognition is not specifically mentioned in the Montevideo Convention. However it is crucial in practice and underlies the ability of the state to enter into relations with other states. If an insufficient number of states were to recognise Palestine (in this scenario), it is doubtful whether it will be considered to have the ability to enter into international relations, and it would therefore be unable to satisfy the requirements of the Montevideo Convention.

The dilemma as to whether or not recognition is one of the requirements for statehood has given rise to two theories: the declaratory theory, and the constitutive theory. Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality. The proponents of the declaratory theory advocate that the act of recognition is not requirement of statehood; statehood and international legal personality arise the moment the requirements of the Montevideo Convention have been fulfilled. These two theories have been evaluated by a South African court in *S v Banda*. The court came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable because:

- it was objective, and
- it took into account only those 4 requirements which are based on well established rules of international law.

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The court criticised the constitutive theory for being arbitrarily applied and politically based.

As pointed out, however, the point remains that one can't completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations depends on recognition, and if it is not recognised by a sufficient number of states, Palestine will fail to become a state in the eyes of the international community (and arguably international law, depending on the chosen theory).

State X is a new state, which has recently declared its independence from State Y. The borders of State X are not fully defined since they are disputed by State Y. In fact, State Y has made an official declaration to the effect that should State X not agree to the boundary parameters as they have been determined by State Y, the latter will not accord it any recognition as a state. State X relies heavily on financial assistance from State Y, and fearing the loss of such assistance, it follows a foreign policy as dictated by State Y. It is, however, developing a form of government totally alien to that of State Y. State X's Prime Minister has travelled extensively in an attempt to establish diplomatic relations in Africa, but the African states display mixed reactions to State X's newly declared independence, and some enter into diplomatic relations with it, whilst others do not. Discuss fully whether State X is an entity enjoying international legal personality. [25]

Or

The international legal personality of states and international organs differs as regards both basis and extent. Bearing this statement in mind, answer the following questions

1) Discuss fully, referring to practical examples, the requirements for statehood in contemporary international law. [15]

For an entity to qualify as a state, it must meet all the requirements for statehood. The Montevideo Convention of 1933 provides the following definition:

> *"The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; (d) capacity to enter into relations with other states".*

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The "permanent population" requirement does not mean that there is a required minimum number of people. Furthermore, the fact that a population is nomadic does not affect statehood adversely, as was pointed out by the court in the *Western Sahara* case. What is important for the purpose of the "permanent population" requirement is that the population lives in accordance with an organised, recognisable social and political structure with a clear chain of command.

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the ongoing territorial dispute with Palestine, Israel still satisfies the requirements for statehood. Furthermore, the territory need not necessarily form on single unit. What is important is that the state must be sufficiently homogenous to be able to perform its functions of government effectively (eg USA and Alaska separated by Canada; East and West Pakistan were separated by India). In other words, there must be a stable community within an area over which its government has control. If the territories are so dispersed that such control cannot be exercised in all of them, statehood will not be granted. The case of *Van Deventer v Hancke & Mossop* is an example of a case where a community of people, ruled by a particular government, qualified as a state despite the fact that it had no territory.

Effective government

The entity must have a government which is independent of any other authority, and it must have legislative and administrative competencies. Brownlie suggests some guidelines which can be used to assess a government's effectiveness:

1. Does it have its own executive organis?
2. Does it conclude relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

Capacity to enter into foreign relations with other states

This requirement means that the state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. The fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of statehood (*R v Christian*). What is important is the presence of external sovereignty. This requirement is also closely linked to the issue of recognition: if the other members of the international community refuse to recognise a state and to enter into relations with it, the state will for all practical purposes be deprived of its capacity to enter into relations with other states.

Recognition

The "requirement" of recognition is not specifically mentioned in the Montevideo Convention. However, it is crucial in practice and underlies the ability of the state to enter into relations with other states. If an insufficient number of states were to recognise X, it is doubtful whether it will be considered to have the ability to enter into international relations, and it would therefore be unable to satisfy the requirements of the Montevideo Convention. The dilemma as to whether or not recognition is one of the requirements for statehood has given rise to two theories: the declaratory theory and the constitutive theory. Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality. The proponents of the declaratory theory advocate that the act of recognition is not a requirement for statehood; statehood and international legal personality arise the moment the requirements of the Montevideo Convention have been fulfilled. These two theories have been evaluated by a South African court in *S v Banda*. The court came to the conclusion that the declaratory theory was the more acceptable one. It was found to be preferable because it was objective, and it took into account

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only those 4 requirements which are based on well-established rules of international law. The court criticised the constitutive theory for being arbitrarily applied and politically based.

As pointed out, however, the point remains that one can't completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations depends on recognition, and if it is not recognised by a sufficient number of states, X will fail to become a state in the eyes of the international community (and arguably international law, depending
on the chosen theory).

TREATIES: RESERVATION

Four states (A, B, C, and D) conclude a treaty regulating their trade relations. State A enters a reservation to one of the articles of the treaty. The reservation is not forbidden by the provisions of the treaty and it does not contradict its object and purpose. State B does not respond to the reservation, while states D and C object to the reservation.
Explain the consequences of A's reservation to the operation of the treaty between the parties.

If a state does not object to a reservation (within 12 months of having been informed of the reservation, or within 12 months of expressing consent to be bound by the treaty), it will be deemed to have consented to the reservation. State B is therefore deemed to have tacitly accepted the reservation.

States C and D expressly object to the reservation. We can assume they have objected to the reservation only and not to the treaty coming into operation as a whole. As a result:

- As between A and B: The entire treaty operates between them, but the provisions of the original treaty to which a reservation has been entered into will be replaced by the provisions of the reservation.
- As between A and C: The reservation does not come into operation between them, since there is no consensus. Likewise, the provision of the original treaty to which the reservation was entered does not come into operation between them due to lack of consensus. Therefore, the treaty will apply between them minus the provision to which
- A entered a reservation. The vacuum created will be governed by the applicable principles of customary international law.
- As between A and D: same as between A and C.
- As between B, C, and D: The treaty in its original form will apply, since the treaty obligations between all non-reserving parties remain unaffected by the reservation.

During a recent revolution, belligerents killed former President Muammar alGaddafi of Libya, and a change of regime followed. In a further attempt to distance itself from the Gaddafi regime, during January 2013 the new

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Government of Libya changed the country's extendedformat name from "Great Socialist People's Libyan Arab Jamahiriya" to "The State of Libya".

Libya acceded to the Convention on the Elimination of all forms of Discrimination against Women (1979) on 16 May 1989. On 5 July 1995 Libya amended its original reservation to the Convention to read: "[Accession] is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Shariah".

Many states responded in opposition to Libya's reservation, for instance, Finland entered the following declaration:

> **"A reservation which consists of a general reference to religious law without specifying its contents [sic] does not clearly define to the other Parties of the Convention the extent to which the reserving State commits itself to the Convention and therefore may cast doubts about the commitment of the reserving state to fulfill its obligations under the Convention. Such a reservation is also, in the view of the Government of Finland, subject to the general principle of the observance of treaties according to which a Party may not invoke the provisions of internal law as justification for failure to perform a treaty.**

In light of these facts, answer the following questions:

1) Discuss Libya's reservation to the Convention in light of the applicable law of treaties, specifically in relation to reservations to treaties. [10]

Article 2(1) of the Vienna Convention defines a reservation as a "unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving, or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that state". Article 19 of the Vienna Convention provides that a State may formulate a reservation unless:

a. the reservation is prohibited by the treaty;
b. the treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
c. the reservation is incompatible with the object and purpose of the treaty.

Two paradigms have developed: one that holds that a reservation which is contrary to the object and purpose of the treaty would be null and void regardless of how the rest of the states have reacted to it; and that which deems the reservation valid until the other states have questioned its validity. The International Court of Justice has held that it may pronounce on the validity of a reservation on the grounds of incompatibility with the object and purpose of the treaty.

Libya's reservation preserves the Islamic Shariah, but seemingly defeats the object and purpose of the Convention. The fact that some states have not objected to such reservations, or that they have

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failed to stipulate that they object to the coming into force of the treaty between themselves and the reserving state, can be put down to a lack of political will. Libya will presumably continue to be bound by the treaty to which it has sought to attach an invalid reservation.

The effects of the reservation are as follows:

- Between Libya and the states that accept the reservation: the entire treaty applies, but the provision in the original treaty to which the reservation has been entered will be replaced by the provisions in the reservation.
- Between Libya and the states rejecting the reservation: the reservation does not come into operation, but the clause to which the reservation is entered is removed from the treaty for those parties. If a vacuum arises from the cancellation of that clause, customary international law will apply to that aspect. The rest of the treaty applies between the parties. If the state rejects the reservation and the treaty coming into operation, the treaty will not operate between Libya and the state.
- Treaty obligations between all other parties remain unaffected.

2) Is Libya still bound by the Convention in light of the fact that there has been a change in regime since it ratified the Convention? Discuss the application of two relevant theories to this question, with reference to authority and examples where appropriate. [10]

A change in government does not affect the operation of treaties which have already been concluded, regardless of how that change was brought about and regardless of its extent. The question of succession to treaties arises only when a new state (with a new international legal personality) has emerged, for example as a result of decolonisation, or one state that has dissolved into a few smaller ones, etc). If there has been a change in international legal personality, the question of treaty succession will depend on the chosen theory.

According to the **theory of universal succession,** the new state succeeds to all the treaties of its predecessor and the rights and duties therein. This would pose a problem if the ideologies of the new state were different from those of the old state, and the new state simply did not find the old obligations acceptable.

In terms of the **clean slate theory** reflected in the 1978 Vienna Convention on the Succession of States with Respect to Treaties, the exact opposite happens: the new state does not have to continue with its predecessor's treaty obligations. This Convention does not seem to reflect customary international law, because the view is not very popular amongst states. This is not surprising because the adoption of such a view would mean that the new state would have to start from scratch and renegotiate all treaties, which is impractical.

In terms of the **provisional succession theory**, the state would be bound to existing treaties for a certain period of time. The state would therefore not have to exist in a legal vacuum, but would be free to terminate the inherited obligations which it did not wish to accept.

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In Southern Africa, the tendency seems to be to continue with treaty obligations. This principle of continuity is reflected in both the 1993 and 1996 Constitutions. The 1996 Constitution states that "the Republic is bound by international agreements which were binding on the Republic when the Constitution took effect". Likewise, Namibia did not adopt the clean slate doctrine. Its 1990 constitution provides that "all existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly… otherwise decides". In *S v Eliasov* and *S v Oosthuisen*, the clean slate theory was used.

CUSTOMARY INTERTIONAL LAW

3) Provide an explanation of the formation and elements of norms of customary international law. [5]

Custom is a practice followed by states because they feel legally obliged to behave in such a way. There are two main requirements for the creation of a customary international law rule:

1) Usus (settled practice)
2) Opinio iuris (a sense of obligation on the part of the states)

Usus, as defined in the *Asylum* case, is "constant and uniform usage". *Opinio iuris* is the second requirement and, as was stated in the *North Sea Continental Shelf* case, the states concerned must feel that they are conforming to what amounts to a legal obligation. In other words, they must feel that if they did not follow the usage they would be breaking international law and would have to bear the consequences for not complying with it.

John Dugard *International Law a South African Perspective* states:

"The extent to which recommendations of the political organs of the United Nations play a part in the formation of custom is a matter of much debate"

Discuss fully, referring to the requirements set by international law for the development of custom, whether United Nations resolutions can give rise to binding customary international law. Refer to relevant case law. [15]

Customary international law rules form if they meet two requirements: *usus* and *opinio iuris*. In *South West Africa, Second Phase*, Justice van Wyk rejected the idea that General Assembly resolutions could give rise to custom, because that would give the General Assembly legislative powers, which would bind dissenters, and the General Assembly was not empowered to do this. Justice Tanaka, however, held a dissenting opinion, which has gained support.

A General Assembly resolution is adopted by a vote, which expresses the acceptance of the principle by those states voting in favour. These votes demonstrate the states' support for the principle. In *S v Petane* Conradie J stated that resolutions of the General Assembly may constitute *opinio iuris*, which,

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if coupled by state practice, could create a rule of customary international law. However, he cautioned that if there was no preceding *usus*, the resolution itself could not create custom. He did mention that one could treat the resolution itself as *usus* and *opinio iuris* at the same time, but was quick to point out that that would stretch the definition of *usus* far too wide, since *usus* ought to be evidenced by material, concrete, and specific acts by states.

A different approach was taken in the *Nicaragua* case. The court discussed the prohibition on the use of force and concluded, relying on the presence of *opinio iuris* alone, that the latter was part of customary international law. As Dugard points out, the court's reasoning "does suggest that a customary rule may be established with little evidence of settled practice where the *opinio iuris* on the part of the states is clear from their support for resolutions of the General Assembly". In *Legality of the Threat or Use of Nuclear Weapons*, the court noted that General Assembly resolutions may be evidence of the existence of *opinio iuris*, but that one also needs to look at the manner in which such resolutions were adopted. For example, a resolution adopted with a number of negative votes and abstentions will fail to establish the existence of *opinio iuris*.

JURISDICTION OF STATES

Peter is a British citizen and international terrorist. He is wanted in many countries by Interpol, and by Tunisia, where he has lawful residency, but he has been responsible for numerous subversive attacks against the Tunisian Government since he has left that country. The Botswana police discovered that he was hiding in a small town on the South African border (but within the territory of Botswana). During the operation to capture him, Peter started shooting indiscriminately. In the process he fired a round across the border into South Africa, killing Francois, a French tourist on holiday in South Africa.

1) Identify which of the countries mentioned are able to exercise jurisdiction over Peter. In each instance, state the crimes for which they can exercise such jurisdiction, and upon which bases they can exercise jurisdiction (for example, passive personality jurisdiction). Refer to applicable authority in your answer. [13]

Tunisia can exercise jurisdiction on the basis of state protection for attacks against the government. In *R v Neumann* the court stated that a sovereign state is automatically entitled to punish crime directed against its independence and safety by an alien, provided that the alien has a connection to the state, such as residence. In *R v Holm* and *R v Pienaar* the court held that no international custom debars a state from trying and punishing offenders who committed acts of treason against South Africa overseas.

1. Botswana and South Africa can both exercise jurisdiction in the shooting of Francois on the basis of territoriality. In *Bankovic v Belgium* the court remarked that "the jurisdictional competence of a state is primarily territorial".
   In this regard, Botswana can exercise jurisdiction on the basis of subjective territoriality, since the shooting started on its territory. South Africa can exercise jurisdiction on the basis of objective territoriality, since the shooting was completed there. Objective territoriality is

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sometimes referred to as “effects” and in *S v Mharapara*, the court observed that the determining factor was the “place of impact, or intended impact, of the crime”.

2. France could exercise jurisdiction for the shooting of Francois on the basis of passive personality. In *United States v Yunis*, a US court relied on the principle of passive personality to exercise jurisdiction over a Lebanese national who had hijacked an aircraft with US nationals onboard.
3. Theoretically, Britain can exercise jurisdiction for the shooting of Francois on the basis of nationality but, traditionally, Anglo-American common law countries have not exercised jurisdiction over their nationals who have committed crimes abroad unless domestic law has made specific provisions to that effect.

Discuss the nature and scope of universal jurisdiction. Include in your discussion the crimes that are covered by universal jurisdiction and substantiate your answer with reference to authority. [12] - [15]

True universal jurisdiction is a highly controversial topic. It applies only in cases of crimes under customary international law. It is said that such crimes injure the interests of the international community as a whole and therefore all states have the right to prosecute. These crimes include piracy, slave-trading, war crimes, crimes against humanity, and torture. The national court is said to exercise universal jurisdiction over a crime with which it does not have any jurisdictional links (eg territoriality, nationality, state protection, effects, passive personality). The court, in trying and punishing the offender, acts as an agent of the international community as a whole.

Many of the abovementioned customary international law crimes have become the subject of a number of international treaties. The signatories have been conferred jurisdiction by virtue of the provisions of the treaties. The states must either prosecute the offender found in their territory or extradite him to a state which will prosecute him.

International law permits (but does not compel) a state to exercise jurisdiction, unless there is a treaty obligation to the contrary.
Most states will have national legislation that criminalises the conduct before the offender may be prosecuted.

The *Arrest Warrant* case concerned a Belgian law which conferred universal jurisdiction on Belgian courts to try such crimes “wheresoever they may have been committed” and to issue a warrant for the arrest of such a person outside Belgian territory. The judges’ opinions differed. Judge Guillaume stated that international law did not recognise universal jurisdiction, except for the crime of piracy. Judge ad hoc Van Wyngaert, on the other hand, held that “there was no proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant was present on the territory of the prosecuting state”. The Belgian law was subsequently amended as a result of political pressure.

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The Rome Statute of the International Criminal Court does not confer universal jurisdiction on the court. However, state signatories have enacted legislation which would enable them to try crimes which fall under the jurisdiction of the ICC (they are war crimes, crimes against humanity, genocide, and the crime of aggression). Should the state party be unable or unwilling to prosecute the offender, the case is deferred to the ICC, which will prosecute, provided that the requirements laid down in the statute are met. The Implementation of the Rome Statute of the International Criminal Court Act is an example of national legislation conferring jurisdiction on a South African court to try an offender who has allegedly committed one of the crimes falling within the jurisdiction of the ICC, even if those crimes were committed outside of South Africa, if the person after commission of the crime is present in the territory of the Republic.

DIRECT AND INDIRECT APPLICATION OF SOUTH AFRICAN INTERNATIONAL DOMESTIC LAW

Consider the following statement:

> ***"A nonselfexecuting treaty binding on South Africa internationally but not incorporated into municipal law will have no direct force of law but may be used to interpret an ambiguous statute or to challenge legislation, along the lines indicated in Glenister v President of the Republic of South Africa" Dugard 2011***

Write an essay in which you explain whether you agree with this statement and why. Discuss the relevant provisions of the Constitution of the Republic of South Africa, 1996, as well as recent South African judicial decisions in which our courts have commented on this issue.

Direct application ("no direct force of law")

The direct application of international law (in the form of treaties) is governed by section 231 of the Constitution. In terms of section 231(4) any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a selfexecuting provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Therefore, this part of the statement is true: a treat which has not been incorporated into SA legislation cannot be applied as law unless the treaty is self-executing.

Indirect application

Treaties can, however, be applied indirectly. The treaty provisions will not be applied as law, but they will be used to interpret and give meaning to existing SA law. In the *Glenister* case the court considered the constitutionality of legislation setting up the specialised unit known as the Hawks and disbanding the Scorpions. It held that the legislation was unconstitutional because the unit in question failed to meet the requirements of independence. The court discussed section 7(2) of the Constitution, in terms of which the state must respect, protect, and fulfill the rights in the Bill of Rights, and therefore has the duty to create an independent anti-corruption mechanism. The content of this requirement was to be found in international anti-corruption agreements which bound SA internationally although they had not been incorporated into SA law. The court also discussed the

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obligation to consider international law when interpreting the Bill of Rights: in terms of section 39(1)(b), when interpreting the Bill of Rights a court must consider international law. The court is not obliged to apply such law. It must, however, use it to find the correct meaning of our Bill of Rights provisions.

Section 39(2) of the Constitution also requires a court, when it develops common law or customary law, and when interpreting any legislation, to promote the spirit, purport, and objects of the Bill of Rights. This shows that the spirit, purport, and objects of the Bill of Rights are inextricably linked to international law and the values and approaches of the international community and international role players.

Another provision of the Constitution which integrates international law into our law in an indirect manner is section 233: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law". International law in this context includes unincorporated treaties to which SA is a party.

In addition, many statutes refer to international law and state that they ought to be interpreted in accordance with international law.

The role and relevance of international law within the South African municipal law is regulated by the Constitution of the Republic of South Africa, 1996. Write a legal opinion in which you discuss and analyse the relevant provisions of the Constitution in this regard. In particular, you must differentiate between customary international law, treaties, and international law as it relates to the Bill of Rights. It is important that you write your opinion with direct reference to Constitutional provisions, as well as any relevant legal authority. [25]

Section 39(1)

In terms of section 39(1)(b) the court (or any tribunal or forum) must consider international law in order to interpret a provision in the Bill of Rights. In *S v Makwanyane* it was stated that international law in this context refers both to binding and nonbinding international law.

International agreements and customary law provide the framework within which the Bill of Rights can be evaluated and understood. It is important to remember that the role of international law in such instances is advisory. The courts do not apply the international law rules directly, in a way they would apply, say, the provisions of a South African statute. The courts consult international law in order to flesh out the provision of our Bill of Rights which has come under their scrutiny. It is the Bill of Rights provision that the courts apply, but the meaning of that provision has been moulded by international law. Therefore we refer to an indirect application of international law.

Section 39(2)

In terms of section 39(2), any court, tribunal or forum is required to promote the spirit, purport, and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport, and objects are linked to international law and the values

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and approaches of the international community. In *Carmichele v Minister of Safety and Security* the court developed a new rule of common law, dealing with the delictual liability of the SAPS. It considered extensively international jurisprudence (including soft law sources). For example, the court cited decisions of the ECHR, and provisions on the Convention on Elimination of All Forms of Discrimination Against Women. Once again, acting in terms of this provision, the court will be applying international law indirectly.

Section 231

This section provides among other things:

(4) Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a selfexecuting provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
(5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

This section sets out the process in which treaties would apply in South Africa. Unless the provision of a treaty is self-executing, it will have to be transformed into municipal legislation.
This can be done in a number of ways:

- Including the provision in the wording of an Act of Parliament
- Including the treaty as a Schedule to an Act of Parliament
- An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*

What is important to understand that whatever the legislative shape the treaty takes, the end result of the process will be that its provisions can be applied directly by the South African courts.

Section 232

This section provides as follows: “Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament”.
From this provision it is clear that customary international law is South African (domestic) law, and as such it will be applied directly. If the alleged rule meets the requirements of *usus* and *opinio iuris*, the courts will take judicial notice of it and apply it. Only two conditions must be met: firstly the rule must not contradict the Constitution; secondly it must not contradict an Act of Parliament. Common law rules and judicial decisions are subordinate or at least on a par with customary international law.

Section 233

Section 233 provides: “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. What is being applied directly is the actual legislative provision, but its meaning will have been determined by international law. International law is therefore being applied indirectly in terms of this provision. International law in this context includes

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incorporated and unincorporated treaties to which SA is a party, as well as customary international law.

TREATIES AND DOMESTIC LAW

Botha, in "Rewriting the Constitution: The 'strange alchemy' of Justice Sachs, indeed", which analyses the impact of the *Quagliani* judgment, concludes with the following: "In brief, and for the present, therefore, extradition treaties may or may not be self-executing, but they do not at present require to be incorporated into our law. The basis of this "addendum" to section 231(4) of the Constitution remains, at best, enigmatic".

1) Explain the process to be followed in terms of section 231(1), (2), (3), and (4) of the Constitution in order to incorporate treaties into South African law. [15]

Section 231 reads as follows:

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a selfexecuting provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Section 231(1) sets out who may negotiate and sign treaties, namely the executive. In practice, the President does not negotiate treaties and signs very few personally. This power is delegated to the Department of Foreign Affairs or line-function minister in charge of the topic covered by the treaty.

Section 231(2) deals with the process by which a treaty becomes binding for South Africa on the international plane. This occurs by approval by the National Assembly and National Council of Provinces by resolution in both houses.

Section 231(3) also deals with treaties binding for South Africa on the international plane, but this time regarding treaties that bind South Africa without approval by the National Assembly and National Council of Provinces. In practice, the treaties mentioned in this section are approached as two categories. First there are technical, administrative, or executive agreements. These are regarded as

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agreements of a routine nature flowing from the day-to-day activities of government departments. They generally also have no budgetary implications for the country.

The second category is treaties not requiring ratification. This is a relatively simple determination, in that a treaty will generally provide whether or not ratification is required.

Section 231(4) deals with the process through which treaties become enforceable on the domestic front (in South Africa) - after it has been incorporated into South African law. In other words, it deals with the process necessary to transpose a treaty from the international plane to the national plane. The section allows for one exception in the case of a selfexecuting provision of an agreement that has been approved by Parliament. Such a provision will be law in the Republic provided that it is not inconsistent with the Constitution or an Act of

Parliament. A self-executing treaty is defined by Shearer as: [A treaty] which does not in the view of American courts expressly or by its nature require legislation to make it operative within the municipal field, and that is to be determined by regard to the intention of the signatory parties and to the surrounding circumstances.

2) With the above quote in mind, explain the enigma that the *Quagliani* judgment has brought into our law. [10]

As discussed, on the basis of section 231(4) of the Constitution, there are only two ways in which a treaty can become part of our law, and therefore form the basis for action in our national courts, namely the following:

1) If it has been made part of our law by legislation.
2) If it is self-executing (in which case it is automatically part of our law).

Quagliani involved an extradition treaty validly concluded between South Africa and the United States of America. This treaty had not (by all the parties' admission) been incorporated by legislation. Therefore in terms of section 231(4), the treaty could not be used by the courts unless it was found to be self-executing.

Justice Sachs confirmed that the extradition treaty had not been incorporated by legislation. He also held that he was not finding that the treaty was self-executing. However, he somehow found that it was enforceable in our law! Thus, he seemingly created a third, unspecified manner in which treaties become law in South Africa (unspecified because it is not one of the two ways provided for by section 231(4)). This is the enigma that the *Quagliani* judgment has brought into our law.

In June 1994 South Africa and State X conclude a treaty providing for their mutual cooperation with respect to the treatment and prevention of tuberculosis

("The 1994 Treaty"). One of the provisions of the treaty deals with the establishment of a Joint Tuberculosis Assistance Fund (JTAF), the money from which is to be used to acquire and distribute the necessary medication to individuals who cannot afford to purchase it for themselves, and pay for these individuals' hospitalisation costs. In 1995 the South African

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Parliament expressly provides in a declaration that the treaty forms part of South African municipal law.

1) Consider the following situation: Mr Poor believes that he qualifies for free TB treatment as envisaged by the 1994 treaty and the creators of JTAF. In 1997 he applies to the South African government in order to obtain it. His application is denied. The South African government argues that no assistance may be obtained from the JTAF at this stage, since the provisions of the treaty have not been enacted into South African municipal law. The Government refers extensively to *Pan American World Airways Incorporated v SA Fire and Accident Insurance Co Ltd*. Analyse this argument with reference to the position of treaties in South African law at the time the treaty was concluded. [5]

The legal position in this scenario is governed by the interim Constitution, 1993. The interim Constitution provided that an international agreement, that is binding on South Africa on the international plane, will become law in South Africa if Parliament "expressly so provides". (There was no requirement of enactment into legislation, as in the pre-Constitutional era, and after the final Constitution.) The meaning of "expressly so provided" was uncertain, and academics were divided on this question.

One group, including Dugard, felt that a mere declaration by Parliament was sufficient to meet this criterion (and this was the procedure in fact followed by Parliament in a number of cases). Another group claimed that parliamentary legislation was still required.

If one follows the first group's viewpoint, it would seem that the treaty in question has become part of SA law and Mr Poor's application should not have been denied.

2) Suppose the treaty was concluded in 1997. Describe the procedure which must be followed in terms of the Constitution of 1996 before the treaty would become part of South African municipal law. [5]

Section 231(4) provides:
Any international agreement becomes law in the Republic when it is enacted into legislation as law; but a selfexecuting provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Thus, all treaties must be transposed into domestic law by a legislative process. There are three main methods by which this may be accomplished:

1. The provisions may be rewritten in an Act of Parliament.
2. The treaty is enacted as a Schedule attached to an Act of Parliament.
3. An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*.

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. 3) Suppose the treaty was concluded in 1997 and Mr Poor's application was denied in 2008. His legal representative prepares an argument in which she refers to relevant South African legislation, as well as to the provisions of the Bill of Rights contained in the South African Constitution, 1996, namely the right of access to healthcare services. Her argument is heavily substantiated with reference to international law. In response, the government claims that the reference to international law is unnecessary, and legally irrelevant. Analyse this argument with reference to the indirect application of international law as provided for in the Constitution. [15]

In terms of section 39(1)(b) the court (or any tribunal or forum) must consider international law in order to interpret a provision in the Bill of Rights. In *S v Makwanyane* it was stated that international law in this context refers to binding and nonbinding international law. International agreements and customary international law form the framework within which the Bill of Rights can be evaluated and understood. Guidance on the interpretation of its provisions can be obtained from views expressed by the UN Committee on Human Rights and the European Commission on Human Rights, and from decisions of the Inter-American Court of Human Rights and the European Court of Human Rights. It must be noted that international law, which may advise the court in terms of section 39(1)(b), is not limited to international human rights law. For example, in *Prince v President of the Law Society, Cape of Good Hope*, the court had to interpret the provision protecting religious freedom and found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedom.

In terms of section 39(2) any court (or tribunal or forum) is required to promote the spirit, purport, and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport, and object are linked to international law and the values and approaches of the international community.

Section 233 provides:
When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Lastly, some statutes may specify that international law should be used in their interpretation. But even if such instructions are not included in the legislative text, the provisions of section 233 mandate the indirect application of international law.

So, the government's argument in this scenario is incorrect, since the Constitution provides for the indirect application of international law, be it in the interpretation of the Bill of Rights, or interpretation of legislation.

The Draft South African Weather Service Amendment Bill prohibits anyone from issuing a severe weather warning without permission from the Weather Service.

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Suppose the Bill becomes legislation in South Africa. You want to challenge the Act before the Constitutional Court on the grounds that it limits the right to one's freedom of expression. Explain whether you would rely on international law in your argument, and to what extent. Substantiate your answer with reference to case law and the relevant Constitutional provisions. [25]

Yes, international law will have to be relied on, as provided for in the Constitution.

Firstly, the court will have to interpret the right to freedom of expression. In terms of section 39(1)(b), the court (or tribunal or forum) must consider international law when interpreting a provision of the Bill of Rights. In *S v Makwanyane* it was stated that public international law in this context refers to binding and non-binding international law. International agreements and customary international law form the framework within which the Bill of Rights can be evaluated and understood. Guidance on the Bill of Rights interpretation can be obtained from views expressed by the UN Committee on Human Rights, the European Commission on Human Rights, as well as from decisions of the Inter-American Court of Human Rights, the European Court of Human Rights, and the African Court of Human Rights. It must be remarked, however, that public international law which may advise the courts in terms of section 39(1)(b) is not limited to international human rights law. For example, in *Prince v President of the Law Society, Cape of Good Hope*, the court had to interpret the provision protecting religious freedom. It was found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedom.

It is important to remember that the role of international law in such instances is advisory. The courts do not apply the international law rules they have consulted directly, in the way they would apply the provisions of a South African statute. It is the Bill of Rights provision which the courts apply, but the meaning of that provision has been moulded by international law. Therefore we refer to an indirect application of international law.

However, although this is the basic rule, you also have to consider which source of international law the court is working with in interpreting the Bill of Rights. If it is a treaty which has been transformed into South African law in terms of section 231(4), or if it is a rule of customary international law which does not conflict with the Constitution or an Act of Parliament under section 232, then it forms part of South African law and as such will have to be applied, and not merely considered, even when interpreting the Bill of Rights under section 39.

Secondly, the court will interpret the SA Weather Service Amendment Act itself. In terms of section 39(2), any court, tribunal, or forum is required to promote the spirit, purport, and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport, and objects are linked to international law and the values and approaches of the international community.

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Section 233 of the Constitution provides that when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

John Smith (JS), a United States (USA) national, commits fraud in the USA and thereafter flees to South Africa. The USA approaches the South African government with a request for JS's extradition to the USA, to stand trial.
Although there is an extradition treaty between South Africa and the United States, this treaty has not been incorporated into South African municipal law. At the extradition hearing, X argues that as the treaty has not been incorporated, the court cannot hear his case. The court rejects this argument, and after a full extradition hearing, an extradition order is issued against JS. JS appeals to the Constitutional Court.

In light of these facts, and with reference to the case law, especially the Constitutional Court's decision in *Quagliani*,

1) Explain fully, the process which must be followed in terms of South African law, in concluding and ensuring the international application of a treaty
[8]

In terms of section 231 of the Constitution

(1) The negotiating and signing of all international agreements is the responsibility of the national executive

This is self-explanatory.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless
it is an agreement referred to in subsection (3).

This explains the process by which a treaty is binding on South Africa on the international plane.

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly or the National Council of Provinces, but must be tabled in the Assembly and Council within a reasonable time.

This subsection also deals with the process through which treaties become binding on South Africa on the international plane, but this time regarding treaties that bind without approval by the National Assembly and National Council of Provinces. In practice, the treaties referred to in this subsection are approached as two categories. First, there are the technical, administrative,

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or executive agreements. These are regarded as agreements of a routine nature flowing from the day-to-day activities of government departments. They generally also have no budgetary implications for South Africa.

The second category are treaties which do not require ratification, and this is a relatively simple determination in that a treaty will generally provide whether or not ratification is required.

2) How does such an internationally binding agreement become South African law? [8]

Section 231(4) of the Constitution states:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a selfexecuting provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

This section deals with the process necessary to transpose a treaty from the international plane to the national plane. This is done by enacting the treaty into national legislation. This may be done by:

- An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*
- Writing the provisions of the treaty into an Act of Parliament
- Enacting the treaty as a schedule to an Act of Parliament

This subsection allows for one exception in the form of a self-executing provision of an international treaty that has been approved by Parliament. Such a provision will be law in the Republic if it is not inconsistent with the Constitution or an Act of Parliament. Shearer defines a self-executing provision as: [A treaty] which does not in the view of the American courts expressly or by its nature require legislation to make it operative within the municipal field…"

3) What effect, if any, has the judgment of the Constitutional Court in *Quagliani* has on your answer to the previous question? [9]

In terms of section 231(4) of the Constitution, there are only two ways in which a treaty can become part of our law. These two ways form the basis for action in our national courts:

1) If it has been made part of our legislation
2) If it is self-executing (in which case it is automatically part of our law)

Quagliani involved an extradition treaty validly concluded between South Africa and the USA. This treaty had not (by all parties' admission) been incorporated into our law by legislation. Therefore, in terms of section 231(4), the treaty could not be used by the courts unless it was found to be self-executing.

Justice Sachs confirmed that the extradition treaty had not been incorporated into South African law by legislation. He also held that he was not finding that the treaty was selfexecuting. However, he somehow found that it was enforceable in our law! Thus, he seemingly created a third, unspecified

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manner in which treaties become law in South Africa (unspecified because it is not one of the two ways provided for by section 231(4)). This is the enigma that the *Quagliani* judgment has brought into our law.

South Africa is not formally a party to the Vienna Convention on the Law of Treaties but has declared that it regards the treaty's provisions as binding. Treaty interpretation is governed by Articles 31 and 32 of the Vienna Convention. You are an advocate for the defence in a case before a South African municipal court where the interpretation of a treaty is at issue. You argue that the court must interpret the treaty in terms of the Vienna Convention. The advocate for the state, on the other hand, argues that because South Africa has not formally signed the Vienna Convention, its provisions are not relevant in a South African court.

Explain, with reference to the Constitution of the Republic of South Africa, 1996, why you feel the court is entitled to make use of such an interpretation. [15]

The Vienna Convention on the Law of Treaties (VCLT) cannot be applied as a treaty incorporated into our law because South Africa is not a party to it and there is no indication in the facts that it has been incorporated as law, which is required in terms of section 231(4) of the Constitution.

The other basis upon which the court would be required to make use of the VCLT is therefore custom. Section 232 of the Constitution states that customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. Before the court can apply customary international law, it will have to establish whether there is in fact such a rule: this it will do by applying the requirements for custom:

1) Usus (settled practice)
2) Opinio iuris (a sense of obligation on the part of the states)

Usus is defined as constant and uniform usage in the *Asylum* case. The very fact that the VCLT was drawn up proves this requirement has been met because the VCLT is a compilation of the rules governing treaties that states at the time considered to be general rules of international law. The practice need not be "universal" therefore a widespread acceptance by states would be sufficient (*Fisheries Jurisdiction* case).

Opinio iuris has also been met because South Africa has declared that it regards the provisions as binding.

The VCLT therefore meets the requirements set in South African law for the existence of a customary rule of international law. The VCLT does not conflict with the Constitution or an Act of Parliament, therefore in terms of section 232 of the Constitution it is municipal law, and the court must interpret the treaty in terms of its provisions.

Section 231(4) of the 1996 Constitution introduced the controversial concept of "selfexecuting agreements". Explain the operation of section 231 in general and then, using case law and

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academic opinion, discuss the difficulty faced by South African courts in interpreting this concept. [25]

Section 231 provides as follows:

(1) The negotiating and signing of all international agreements is the responsibility of the national executive

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when the Constitution took effect.

The students should discuss the decision by Justice Sachs in *Quagliani* and the confusion created by the Constitutional Court in the *Quagliani* case.

On the basis of s 231(4) there are only two ways in which a treaty can become part of our law, and therefore form the basis for action in our national courts, namely the following:

(1) if it has been made part of our law by legislation – and here you will remember the three “methods” of incorporation that Dugard lists (study unit 2.2 at p 85 of the study guide); 8

(2) if it is self-executing (in which case it is automatically part of our law).

Quagliani involved an extradition treaty validly concluded between South Africa and the United States of America. This treaty had not (by all the parties’ admission) been incorporated into our law by legislation. Therefore, in terms of section 231(4), the treaty could not be used by the courts unless it was found to be self-executing.

In two earlier judgments the North Gauteng High Court had come to directly opposite findings on this issue.

In *Nello Quagliani v President of the RSA* case 28214/06 TPD 18.4.2008 and *Stephen Mark van Rooyen & Laura Brown v President of the RSA* case 959/04 TPD 18.04.2008 (unreported), Preller J found that the extradition treaty between the US and RSA was not self-executing, and as it had not been incorporated by legislation as required by section 231(4), it was not available to the court.

In *Stephen William Goodwin v Director-General Department of Justice and Constitutional Development* case 211142/08 TPD (unreported), Ebersohn AJ held that the treaty “might” be self-executing – which is of course no answer as it might also not! – but was binding between the parties and enforceable under SA national law.

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These cases came before the Constitutional Court and were treated together by Sachs J as *Quagliani* (2009 ZACC 1). Although we hoped that the judge would provide the first meaningful (and definitive) interpretation of exactly what is meant by self-execution in the face of these conflicting judgments, we hoped in vain. Instead of clearing up the "murky waters" of section 231(4), it would appear that Justice Sachs troubled them even further! We are no closer to knowing what a self-executing provision in a treaty is, nor can we any longer be certain that section 231(4) provides the only two methods for the incorporation of treaties. What we can say, however, is that Justice Sachs confirmed that the extradition treaty (RSA/US) had not been incorporated by legislation; he also held that he was NOT finding that the treaty was self-executing, BUT he did find that it was enforceable in our law.

We therefore now have a third, unspecified manner in which treaties become law in South Africa. While this judgment by the Constitutional Court stands, one can only hope that it will be restricted to extradition treaties only. It has, however, opened the door to speculation of which you should be aware.

It is worth noting that in 2010, Binns-Ward, J held in *Claasens v Minister of Justice and Development* that the International Covenant on Civil and Political Rights – one of the cornerstone instruments of international human rights law that enshrines the most basic human rights, such as the right to life – was not self-executable. This shows that not much has changed in the inconsistent and incoherent approach South African courts have taken regarding the issue of self-execution.

TREATIES: SUCCESSION

1) Discuss the three theories governing succession to treaties. [10]

A change in government does not affect the operation of treaties which have already been concluded, regardless of how that change was brought about and regardless of its extent. The question of succession to treaties arises only when a new state (with a new international legal personality) has emerged, for example as a result of decolonisation, or one state that has dissolved into a few smaller ones, etc). If there has been a change in international legal personality, the question of treaty succession will depend on the chosen theory.

According to the **theory of universal succession**, the new state succeeds to all the treaties of its predecessor and the rights and duties therein. This would pose a problem if the ideologies of the new state were different from those of the old state, and the new state simply did not find the old obligations acceptable.

In terms of the **clean slate theory** reflected in the 1978 Vienna Convention on the Succession of States with Respect to Treaties, the exact opposite happens: the new state does not have to continue with its predecessor's treaty obligations. This Convention does not seem to reflect customary international law, because the view is not very popular amongst states. This is not surprising because the adoption of such a view would mean that the new state would have to start from scratch and renegotiate all treaties, which is impractical.

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In terms of the **provisional succession theory**, the state would be bound to existing treaties for a certain period of time. The state would therefore not have to exist in a legal vacuum, but would be free to terminate the inherited obligations which it did not wish to accept.

In Southern Africa, the tendency seems to be to continue with treaty obligations. This principle of continuity is reflected in both the 1993 and 1996 Constitutions. The 1996 Constitution states that "the Republic is bound by international agreements which were binding on the Republic when the Constitution took effect". Likewise, Namibia did not adopt the clean slate doctrine. Its 1990 constitution provides that "all existing international agreements binding upon Namibia shall remain in force, unless and until the National Assembly… otherwise decides". In *S v Eliasov* and *S v Oosthuisen*, the clean slate theory was used.

MAINTAINING INTERNATIONAL PEACE AND SECURITY \: ENFORCEMENT OF INTERNATIONAL LAW

2) Discuss the notion of self-defence in international law. [10]

One of the exceptions to the rule against the threat or use of force (contained in Article 2(4) of the UN Charter) is an act carried out by a state in self-defence.

Article 51 of the Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right to self-defence shall immediately be reported to the Security Council".

This Article contains a number of crucial points:

- The act in the exercise of the right to self-defence must be reported to the Security Council.
- The action is therefore valid only until the Security Council acts.
- The purpose of the use of force must be clear, namely to defend oneself.
- The force exercised in self-defence must be proportionate to the threat used.

There is uncertainty as to whether the right to self-defence can be exercised only if an armed attack occurs or whether Article 51 allows anticipatory self-defence.

State A and State B are neighbouring states. The border of State A has become a stronghold of Z, a militant organisation sponsored by State X, which harbours strong anti-State B sentiments. The government of State A claims to be too weak to disarm Z. Members of Z keep on acquiring weapons and building strongholds on the border. One day, some of Z's members kidnap two soldiers from State B.

State B invades state A and bombards the area at the border and its surroundings, hoping to bring Z to its knees.

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Evaluate the lawfulness or otherwise of State B's actions. [10]

The first problem that State B may run into is showing that Z's actions are attributable to State A (although they are certainly attributable to State X).
If that is overcome, State B may be said to be acting in reprisal to the kidnapping of the two soldiers, in which case the most glaring example of unlawfulness on State B's part would be the lack of proportionality between its action and that of Z. Furthermore, it appears that B has not attempted to rectify the situation peacefully before proceeding to bomb the area at the border.

State B may also claim to be acting in self-defence. The requirements for self-defence for Article 51 of the UN Charter are:

1. An armed attack must occur.
2. The purpose for the use of force must be clear: to defend oneself.
3. The force exercised in self-defence must be proportionate to the posed threat.
4. The act of exercising the right to self-defence is valid only until the Security Council acts.

The armed attack has not yet occurred, but Z is showing signs of planning an attack on State B. Whether or not Article 51 of the UN Charter includes the right to launch a preemptive strike is a moot point. Under customary international law, states have the right to respond in situations that fall short of an armed attack. However, it must be shown that:

1. State B has been targeted by the hostile activities of another state.
2. State B has exhausted all alternative methods of protecting itself. The use of force in self-defence must be a last resort.
3. The threat or danger is impending.
4. The use of force is proportional to the threat.

If all of the above requirements have been complied with, State B will have acted lawfully.

Write a paragraph explaining how the types of sanctions available for violation of national (domestic) laws within a state differ from the type of sanctions available at an international level against states which have violated international law. [10]

Municipal (national law) judgments are backed by the complete executive machinery of the state, in the form of a police force. In international law, there is no central executive authority with a police force at its disposal. At the international level, the Security Council does have some "sanctions" that can be used: Chapter VII of the UN Charter allows the Security Council to direct its members, either individually or collectively, to use force against a state whose violation of international law constitutes a threat to international peace.

States can resort to self-help. The different types of actions that can be taken include:

1. Reprisal

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2. Retortion
3. Self-defence
4. Embargo and boycott
5. Sanction
6. Diplomatic action

State X and state Y are neighbouring states. The border between them has become stronghold of a militant organisation (W), openly opposed to the ideology of state Y. Because the militants' State X and state Y are neighbouring states. The border between them has become the dislike is shared by state X, it turns a blind eye to W's activities. Members of W continue to acquire weapons and to stockpile them near the border. One day W's members kidnap two soldiers from state Y. State Y considers this to be an act of war, it invades state X and bombards the border area and surrounds. State Y justifies its actions by claiming that it acted in anticipatory selfdefence and that its actions amount to a lawful reprisal in terms of international law. Discuss the validity of state Y's claim and analyse the requirements for self-defence contained in article 51 of the UN Charter as well as those for lawful reprisal. [25]

Reprisal
In this instance the state who has suffered as a result of the breach of international law, performs an action, which at first glance appears to be unlawful (such as freezing all of the violator-state's assets found in its territory). Because the injured state has retaliated against the other state's illegal action, the act of reprisal will be permissible. It will be considered 'lawful reprisal', provided that:

It is indeed in response to a prior illegal act
It is carried out in light of restoring equilibrium in international relations
It is proportionate to the injury sustained
It has been used as a last resort, which means that the injured state must have first attempted rectification.

Self-defence
One exception to the rule prohibiting the use of force is an act carried out in self-defence. Self-defence is governed by Article 51 of the UN Charter, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security." This article further provides that the self-defence measures taken by the member state must be reported to the Security Council immediately and that they shall not in any way affect the authority and responsibility the latter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The following characteristics are important:

- The act taken in exercising the right to self-defence is valid only until the Security Council acts.
- The purpose of the use of force must be clear: to defend oneself.

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- The force exercised in self-defence must be proportionate to the posed threat.

It is not clear whether the right to self-defence can be exercised only if an armed attack occurs (whether Art 51 amounts to an exclusive and complete formulation of the right), or whether Art 51 allows anticipatory self-defence (whether inherent right indicates that Art 51 has preserved the pre-Charter customary law definition of the right to self-defence, which would include the right to launch a pre-emptive strike). Under customary international law the right to use force in self-defence was justified if the need for it was instant, overwhelming and immediate, and there was no viable alternative action.

SOURCES OF PUBLIC INTERNATIONAL LAW: ARTICLE 38

3) What are traditionally recognised as the sources of public international law? [5]

1. International agreements (treaties) (Article 38(1)(a))
2. International custom (Article 38(1)(b))
3. The general principles of law recognised by civilised nations (Article 38(1)(c))
4. Judicial decisions and "the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law" (Article 38(1)(d))

JURISDICTION

1) Discuss the principles, as set out in the *Lotus* case, which form the basis of jurisdiction in public international law and list the bases of jurisdiction. [10]

The three principles laid down by the court were:

1) One state cannot exercise jurisdiction in the territory of another unless they have agreed thereto.
2) One state may exercise jurisdiction in its own territory over acts that happened in the territory of another state unless an international law rule forbids this. 3) The territoriality of criminal cases is not absolute.

The result was an extra-territorial free-for-all.

The bases of jurisdiction are:

1. Territoriality
2. Effects (subjective and objective territoriality)
3. Nationality

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4. State protection
5. Passive personality
6. Universality

2) Write a legal opinion on universal jurisdiction, explaining its development, use, and crimes covered. [15]

True universal jurisdiction is a highly controversial topic. It applies only in cases of crimes under customary international law. It is said that such crimes injure the interests of the international community as a whole and therefore all states have the right to prosecute. These crimes include piracy, slave-trading, war crimes, crimes against humanity, and torture.

The national court is said to exercise universal jurisdiction over a crime with which it does not have any jurisdictional links (which are territoriality, nationality, state protection, effects, and passive personality). The court, in trying and punishing the offender, acts as an agent of the international community as a whole.

Many of the abovementioned customary international law crimes have become the subject of a number of international treaties. The signatories have been conferred jurisdiction by virtue of the provisions of the treaties. The states must either prosecute the offender found in their territory or extradite him to a state which will prosecute him.

International law permits (but does not compel) a state to exercise jurisdiction, unless there is a treaty to the contrary. Most states will have national legislation that criminalises the conduct before the offender may be prosecuted.

The *Arrest Warrant* case concerned a Belgian law which conferred universal jurisdiction on Belgian courts to try such crimes “wheresoever they may have been committed”, and to issue a warrant for the arrest of such a person outside Belgian territory. The judges’ opinions differed. Judge Guillaume stated that international law did not recognise universal jurisdiction, except for the crime of piracy. Judge ad hoc Van Wyngaert, on the other hand, held that “there was no proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant was present on the territory of the prosecuting state”. The Belgian law was subsequently amended as a result of political pressure.

The Rome Statute of the International Criminal Court does not confer universal jurisdiction on the court. However, state signatories have enacted legislation which would enable them to try crimes which fall under the jurisdiction of the ICC (they are war crimes, crimes against humanity, genocide, and the crime of aggression). Should the state party be unable or unwilling to prosecute the offender, the case is deferred to the ICC, which will prosecute, provided that the requirements laid down in the statute are met.

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The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 is an example of national legislation conferring jurisdiction on a South African court to try an offender who has allegedly committed one of the crimes falling within the jurisdiction of the ICC, even if those crimes were committed outside of South Africa, if the person after the commission of the crime is present in the territory of the Republic.

Name the grounds on which jurisdiction may be exercised by a South African court in terms of the provisions of this Act.

1. Territory
2. Nationality
3. Passive personality
4. Protection of the state
5. Any other basis recognised by law

Briefly list and explain the bases for jurisdiction in international law. [10]

1. Territoriality
2. Effects (subjective and objective territoriality)
3. Nationality
4. State protection
5. Passive personality
6. Universality

Territoriality:
A state has jurisdiction over all criminal acts occurring in its territory and over all persons committing such acts.

Effects:
A state has jurisdiction over acts performed outside its territory which have an effect inside its territory.

Nationality:
A state has jurisdiction over its own nationals wherever they act.

Passive personality:
Where a foreigner violates the rights of a state's national outside that state, the state of the national may claim jurisdiction over such foreigner.

State protection:

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A state has jurisdiction over foreigners who perform an act outside the state which endangers the safety of the state.

Universality:

In the case of international crimes any state may claim jurisdiction. The tradition, customary law international crimes are piracy, war crimes, and crimes against humanity.

Answer the following questions on jurisdiction in international law

Miss Aim stands on the banks of the Orange River in Namibia and fires a warning shot at a poacher in Namibia. The shot goes awry and hits Ms BD Luck, who is standing on the opposite bank of the river in South Africa watching events. Indicate (yes or no) whether Namibia and/or South Africa will have jurisdiction and name the bases of such jurisdiction. [4]

Yes.

Namibia: Subjective territoriality - the act commenced in its territory and was completed in the territory of another state.

South Africa: Objective territoriality - the act commenced in the territory of a foreign state and completed on SA territory.

Ms PS Port, a South African national, travels on holiday to Portugal. While in Portugal, she shoots and kills a fellow South African staying at her hotel in Lisbon. State briefly (yes or no) whether Portugal can exercise jurisdiction over Ms PS Port and, if yes, list on what basis. [2]

Yes. Portugal can exercise jurisdiction on the basis of territoriality.

Mr T Reason, a British national living in London, plots to bring down the government of South Africa by introducing a vicious computer virus that will bring South Africa's internet and commerce to a standstill. State briefly (yes or no) whether South Africa may exercise jurisdiction over Mr T Reason and if so, list on what basis. [2]

Yes, on the basis of state protection because the foreigner has performed an act which endangers the safety of the state.

Mr D Evil, a notorious war criminal, is hunted down by Interpol agents and found in the peace-loving country, Idyll. State briefly (yes or no) whether a third party state, not connected to Mr D Evil in any way, could exercise jurisdiction over Mr D Evil, and if so, list on what basis. [2]

Yes. D Evil has committed an international crime, which is said to threaten the interests of the international community as a whole, and any state may claim jurisdiction on the basis of universality.

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Write a legal opinion on universal jurisdiction, explaining its development, use, and crimes covered (both custom and treaty based). Explain further whether it is effective. Substantiate your answer with reference to authority. [15]

True universal jurisdiction is a highly controversial topic. It applies only in cases of crimes under customary international law. It is said that such crimes injure the interests of the international community as a whole and therefore all states have the right to prosecute. These crimes include piracy, slave-trading, war crimes, crimes against humanity, and torture.

The national court is said to exercise universal jurisdiction over a crime with which it does not have any jurisdiction link (such as territoriality, nationality, state protection, effects, and passive personality). The court, in trying and punishing the offender, acts as an agent of the international community as a whole.

Many of the abovementioned customary international law crimes have become the subject of a number of international treaties. The signatories have been conferred jurisdiction by virtue of the provisions of the treaties. The states must either prosecute the offender found in their territory or extradite him to a state which will prosecute him.

International law permits (but does not compel) a state to exercise jurisdiction, unless there is a treaty obligation to the contrary. Most states will have national legislation that criminalises the conduct before the offender may be prosecuted.

The *Arrest Warrant* case concerned a Belgian law which conferred universal jurisdiction on Belgian courts to try such crimes “wheresoever they may have been committed” and to issue a warrant for the arrest of such a person outside Belgian territory. The judges’ opinions differed. Judge Guillaume stated that international law did not recognise universal jurisdiction, except for the crime of piracy. Judge ad hoc Van Wyngaert, on the other hand, held that “there was no proposition that universal jurisdiction for war crimes and crimes against humanity can only be exercised if the defendant was present on the territory of the prosecuting state”. The Belgian law was subsequently amended as a result of political pressure.

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crimes were committed outside of South Africa, if the person after the commission of the crime is present in the territory of the Republic.

INTERPRETATION OF TREATIES

Discuss the interpretation of treaties in international law. [15]

Treaty interpretation is governed by Articles 31, 32, and 33 of the Vienna Convention.
There are two principal streams in the interpretation of treaties:

1) The literalist or textual approach, which concentrates on the actual text of the treaty.
2) The purposive approach, which interprets the treaty to give effect to the purpose for which it was concluded.

The Vienna Convention marries the two approaches in Article 31 by providing that treaties must be interpreted in good faith in accordance with the ordinary meaning of the words used in context, bearing in mind the object and purpose of the treaty.

Context is defined as:

- Text, preamble and annexures;
- Agreements between parties relating to the conclusion of the treaty;
- Instruments by certain parties accepted by other parties relating to the conclusion of the treaty.

Once the primary means of establishing meaning have been used, you can turn to the secondary means, but only:

- to confirm the meaning you have established
- if the meaning established is ambiguous or obscure, or
- if the meaning established is manifestly absurd or ambiguous

The secondary means referred to in Article 32 of the VC are the preparatory work leading to the conclusion of the treaty and the general circumstances surrounding the conclusion of the treaty.

AUTHORITY TO CONCLUDE TREATIES: VALID TREATIES

Write a short essay in which you explain whether or not an oral agreement can qualify as a treaty. (10)

The problem with oral agreements is always one of proof. The Vienna Convention on the Law of Treaties (VC) provides in Article 3 that the fact that the VC only applies to agreements in writing, does not affect the legal force of oral agreements. This means in effect that the oral agreements are

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treaties, because they satisfy all the requirements of treaties (an agreement between international law subjects which has full legal force and is governed by international law). The only difference between treaties in writing and oral agreements is that an oral agreement cannot be registered as a treaty with the UN Secretariat. The oral agreement is not governed by the provisions of the Vienna Convention. This in turn means that any dispute in terms of the treaty cannot be enforced by the ICJ. There is, however, no other category into which an oral agreement such as this fits and in our view it must be regarded as a treaty.

South Africa (represented by her Minister of Health), the United States of America (represented by her President), and the Republic of Zeldonia (represented by one of her provincial premiers) meet at a conference in Washington, DC. They conclude an agreement entitled "Treaty for the Ethical Implementation of Stem Cell Research".

Analyse the facts in this scenario with respect to the requirements for the conclusion of a treaty as set out in the 1969 Vienna Convention on the Law of Treaties, and explain whether a valid treaty has been concluded between the three states. [15]

Certain people are presumed to validly conclude binding treaties because of the position they hold (*ex officio*). In terms of Article 7(2) of the Vienna Convention, they are:

1. The head of state
2. The head of government
3. The Minister of Foreign Affairs
4. The head of a diplomatic mission (ambassador/consul)
5. State representatives at treaty-making conferences

If a person does not fall into one of these categories (ie the Minister of Health and the provincial premier in our scenario), then Article 7(1)(a) applies, and he/she must produce "full powers". Full powers are documentary proof issued by his/her government stating that he/she is authorised to represent the state in the conclusion of the treaty.
Alternatively, Article 7(1)(b) provides that, if it is clear from the practice of the states or from other considerations, that the parties intended the person to represent the state, full powers aren't necessary.

The Minister of Health and the premier of the province would have to produce full powers

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Define a treaty and discuss fully the characteristics identified in the Vienna Convention on the Law of Treaties for the creation of a valid treaty. [10]

A treaty is an agreement, whether written or oral, concluded between public international law subjects, with the intention of creating a public international law relationship. The agreement must give rise to reciprocal rights and duties and must be governed by public international law.

Because a treaty is a consensual agreement, there must be consent between the parties. The parties must agree to create a public international law agreement.

The parties must be competent to conclude the treaty.
Certain people may bind the state *ex officio* in terms of Article 7(2) of the VC:

1. Heads of state
2. Heads of government
3. The Minister of Foreign Affairs
4. The head of a diplomatic mission (ambassadors/consuls)
5. State representatives at treaty-making conferences

If a person falls outside of this category, they must produce full powers.

The treaty must give rise to reciprocal rights and duties, and the rights and duties must be governed by public international law.

Define *ius cogens* and explain the effect of this concept on the validity of a treaty. [10]

Ius cogens is defined as an obligatory rule of general international law, accepted and recognised by the community of states as a whole as a rule from which no derogation is allowed, which can be altered only by another norm or rule of the same kind.

States cannot “contract out” of *ius cogens* - it is absolutely binding on all states whether they like it or not. The only rule more or less accepted as *ius cogens* is the prohibition on the use of force. A treaty which conflicts with an already existing norm of *ius cogens* is void from the outset, and no treaty comes into existence. However, if a treaty is already in existence and a new rule of *ius cogens* then develops, the treaty isn’t void; performance which has already been rendered in terms of it is perfectly valid, but there can be no further performance.

TEMINATION AND SUSPENSION OF TREATIES

South Africa, as the most industrialised state in Southern Africa, is in desperate need of additional water supplies. Lesotho, as an economically less developed state, needs revenue and has abundant water supplies. The two states therefore conclude a treaty in terms of which

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they agree that South Africa will erect a series of dams in Lesotho which will eventually supply South Africa with water and Lesotho with revenue.

During the planning stages of the dams, Lesotho is shaken by a severe earthquake as a result of which the river on which the dams were planned is diverted and its flow permanently reduced. Engineers, who are amazed by the earthquake as there has never before been such an occurrence in the region, advise that the project is no longer viable. South Africa claims that it may validly terminate the treaty. You are approached for a legal opinion on South Africa's claim.

1) Provide a well-reasoned opinion setting out the argument which South Africa should raise. [8]

South Africa may terminate the treaty on the basis of *rebus sic stantibus* (fundamental change of circumstances). The situation is governed by Article 62 of the Vienna Convention. The following requirements must be fulfilled:

1. The existence of the circumstances must have been an essential basis for the conclusion of the treaty.
2. The change of circumstances must drastically transform the extent of the state parties' obligations.
3. The circumstances (which a state claims to have been changed) existed at the time the treaty was concluded.
4. The change in circumstances must have been unforeseen by the parties.

Rebus sic stantibus may not be raised to terminate treaties which establish boundaries, or by the state party responsible for the change.

From the facts, it is evident that at the time of the conclusion of the treaty earthquakes were not a feature in Lesotho and could not have been foreseen by the parties. The earthquake radically affected the obligations under the treaty - Lesotho could not deliver the water that was the essential basis for the conclusion of the treaty. No party may be held responsible for the earthquakes. There was a fundamental change of circumstances which would give rise to a right to terminate the treaty.

Explain fully whether, and if so, how, your opinion would differ if Lesotho were regularly plagued by earthquakes. [5]

If Lesotho were regularly plagued by earthquakes it would be a circumstance which existed when the treaty was concluded, and would therefore have been clearly foreseeable. In these circumstances, another earthquake could not have been raised as a ground for terminating the treaty.

What other grounds are available in international law which would allow for the termination of a treaty? List these with a practical example of each. [12]

1) **Fulfilment of obligation**

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Treaties concluded to serve a specific purpose will terminate once the object of the treaty has been fulfilled. For example, after post-election riots in Kenya in 2007, there was a food shortage. SA and Kenya concluded a treaty for the delivery of maize. Once the maize had been delivered, the object of the treaty had been fulfilled and the treaty will terminate.

2) **Treaty provision**

Where a treaty specifically provides that it may be terminated in a specific way, the treaty will terminate if the prescribed procedure is followed. For example, Article XVIII of the extradition treaty concluded between Great Britain and Peru provides: "[This treaty] may be terminated by either of the High Contracting Parties by a notice not exceeding one year and not less than six months". If the necessary notice is given, the treaty will terminate once this period has passed.

3) **Consent**

If all parties concerned agree to its termination.

4) **Conclusion of a new treaty**

If all the original treaty parties conclude a new treaty which covers the same subject matter, and it appears that the parties intended the new treaty to govern the issues, or the two treaties conflict to such an extent that they cannot operate concurrently.

5) **Impossibility of performance**

If an object indispensable for the performance is permanently destroyed, and this isn't the fault of the party raising impossibility.

6) **Breach of treaty**

7) **War and suspension of diplomatic/consular relations**

8) **Ius cogens**

If the treaty is in conflict with a newly developed *ius cogens*, it is automatically terminated.

9) **Unilateral repudiation**

10) **Rebus sic stantibus**

INTERNATIONAL ORGANISATIONS

The World Health Organisation is an agency of the United Nations. The International Aid Organisation (IAO) is an organisation made up of the following members: the Zuba government - a small poverty-stricken African state with massive health problems; Asio European a multinational mining conglomerate; and Aid International - a humanitarian

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organisation with membership drawn from the councils of the leading universities of Nigeria and Uganda.

The WHO and IAO conclude an agreement in terms of which the WHO undertakes to build a multi-million dollar hospital and research centre in Zuba to fight the spread of AIDS in that country. Problems, however, arise and the WHO decides to pull out of the agreement. Zuba wishes to enforce the agreement.

Discuss fully the position from the point of view of both the WHO and IAO in light of The classification of these two organisations in light of their characteristics [8]

The one feature that will always be common to all international organisations is the fact that their members are states, or other international organisations made up of states. International organisations may also consist of organs of state.

WHO is an international organisation made up of states. It functions under the auspices of the UN.

The IAO is not an international organisation since its members are neither states nor international organisations. Asio European is a company, but even a transnational company which operates in various countries is not an international organisation. Aid International is not an international organisation either, because its members are universities. Strictly speaking, universities are not organs of state. The IAO may try to argue that universities are organs of state, but either way the status of IAO remains the same because of the fact that one of its members, Asio European, is an international company and not an international organisation.

The classification of the agreement between them. [5]

The agreement between the different shareholders is an ordinary contract, not a treaty, as only international law subjects can conclude treaties. In this case, we have an agreement between an international organisation and a private entity. Although it is possible to make a contract subject to international law, this was not mentioned in the facts.

Who should sue and who should be sued for fulfilment of the agreement? [2]

The IAO should sue the WHO. The only problem that may arise is that the international organisation may invoke immunity to block the process. Generally speaking, immunity does not apply to commercial contracts and the court will in all likelihood have jurisdiction.

What legal system will govern the agreement and conflicts arising from it? [4]

The municipal legal system of Zuba will govern the contract and any conflicts arising from it. The contract itself may specify what legal system should govern its terms and any disputes arising from it.

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What court(s) the agreement should serve before and why. [4]

The agreement will serve before the municipal court in Zuba (or as provided for in the contract itself). It will not serve before the ICJ

With reference to the decision of the International Court of Justice (ICJ) in *Reparations for Injuries Suffered in the Service of the United Nations*, discuss whether, and if so on what basis and to what extent, an international organisation enjoys legal personality. [10]

An international organisation is made up of states, or other international organisations. It has a limited international legal personality because its legal personality depends on its creators' discretion. International organisations are limited by their respective constituent charters (the agreements that establish them). They must be created by virtue of an international agreement among states.

Even though international organisations do not have a capacity as extensive as that of states, they can act independently on the international plane. This was confirmed by the ICJ in *Reparations for Injuries Suffered in the Service of the United Nations*. In this case, the ICJ was asked to find whether the UN could exercise diplomatic protection over its agents and also institute action on their behalf for injuries suffered in the course of their duties. The exercise of diplomatic protection and the institution of a claim for harm to a national are both capacities which typically accrue to a state. By finding that the UN could in fact do both, the ICJ recognised that it was a subject of international law enjoying international legal capacity.

The extent of international legal personality enjoyed by international organisations differs. The powers of any given organisation depends on the purpose for which it was created and the functions and powers which it has been given. As stated above, what an international organisation may or may not do is set out in its founding document, or constituent charter, and may be further developed by practice.

An international organisation may:

- Pursue legal remedies and enjoy rights and duties under international law.
- Sue and be sued.
- Have the capacity to own, acquire, and transfer property.
- Enter into contractual and international agreements with states and other international organisations.

The one feature that will always be common to all international organisations is the fact that their members are states or other international organisations made up of states.

State A and State B have joined forces to invade State C in search of weapons of mass destruction. The sentiment amongst the international community, however, is that the reason for the invasion is unfounded and that the situation poses a threat to international peace and

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security. The resolution brought before the Security Council in the United Nations calling for the withdrawal of State A and State B's troops is vetoed by one of the permanent members of the Security Council.

Briefly discuss the international legal personality of international organisations and their general characteristics. [10]

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- Have the capacity to own, acquire, and transfer property.
- Enter into contractual and international agreements with states and other international organisations.

The one feature that will always be common to all international organisations is the fact that their members are states or other international organisations made up of states. .

In light of the abovementioned set of facts, explain whether this crisis arising from the veto has paralysed the United Nations, or whether the General Assembly could take some action. In your answer, you must discuss the powers of the General Assembly and the question whether the General Assembly has any authority pertaining to the maintenance of international peace and security. [10]

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The main purpose of the United Nations is to maintain international peace and security. It does this through its principal organs, which are the General Assembly (GA), the Security Council (SC), the Economic and Social Council, the Trusteeship Council, the Secretariat, and the International Court of Justice. The primary organ charged with maintaining peace and security if the Security Council.

As with any international organisation, the GA has only the powers which are given to it in its constituent document, the UN Charter. The GA may consider and make recommendations to UN members, or the SC regarding the general principles of cooperation in the maintenance of peace and security. It may also make recommendations on any matter relating to peace and security which is referred to it by a UN member, the SC, or a non-member state. This is subject to one proviso: the GA must refer any question which requires action to the SC before or after the GA has discussed the matter. It may further alert the SC to matters which are likely to endanger peace and security. The GA may make no recommendations on matters which are serving before the SC (unless the SC requests so).

In terms of the powers conferred on it, therefore, the GA is not empowered to act: in other words to actually enforce peace and security. This it must refer to the SC. The five permanent members (US, UK, Russia, France, China) have veto power, in terms of which any of them may veto any resolution before the SC. If one of the permanent members does not approve of proposed action to maintain peace and security, it can kill it right there.

In response to this "veto crisis", the GA argues that although the SC has the primary power for the maintenance of international peace and security, it does not have the sole power. Where the SC can't or won't act and the GA is paralysed, the GA draws on "residual powers" and can recommend "collective measures, including, in the case of a breach of peace or an act of aggression, the use of armed force". In other words, what the GA is attempting to do here is to expand the powers conferred on it in the Charter through creative interpretation.

X, a foreign national, commits fraud in State A and thereafter flees to South Africa. State A approaches the South African government with a request for X's extradition to State A to stand trial. There is no extradition treaty between State A and South Africa, but the SA Extradition Act provides in section 3(2) that suspected criminals may be extradited in the absence of a treaty if "the President so decides". The SA President does "so decide" and the case is referred for an extradition hearing in terms of the Act. The full extradition process is followed, and the result is an extradition order against X.

X's advocate claims that the President's decision under section 3(2) of the Act amounts to the conclusion of an informal agreement, and that the definition of "international agreement" in section 231(1) includes informal agreements.

Discuss the term "international agreement" as used in section 231 of the South African Constitution. Indicate what meaning the SA courts have given to this term, and the definition which they have accepted. [10]

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The meaning of “international agreement” is addressed in *Harksen v President of the RSA* and *Jurgen Harksen v President of the RSA* (CC). In an extradition case, it was claimed that the term “international agreement” was wider than the term “treaty” and included informal agreements between states. Although the Cape Provincial Division held that the term could include informal agreements, this was rejected by the Constitutional Court.

In terms of the Constitutional Court decision, therefore, “international agreement” as occurring in section 231 is to be understood as “treaty” as defined in Article 2(1) of the Vienna Convention on the Law of Treaties:

“An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”

The treaty establishing the International Criminal Court (Rome Statute) came into force in July 2002. List the situations in which this court may exercise its jurisdiction.
[5]

1. At least one of the parties involved is a state party.
2. The accused is a national of a state party.
3. The crime is committed in the territory of a state party.
4. A state, not party to the Statute, may decide to accept the court’s jurisdiction over a specific crime that was committed within its territory, or that was committed by its national.
5. The United Nations Security Council refers a situation to the prosecutor.

SECTION B: QUESTIONS AND ANSWERS

IMMUNITY AS AN EXCEPTION TO JURISDICTION: STATE/SOVEREIGN IMMUNITY

State Z is in the throes of a civil war with frequent clashes between rebels and governmental forces. Mr C Ruel, State A’s President, orders the torture and murder of all the rebels who have been caught by the governmental forces, but the rebellion continues. In January 2013, the rebels destroy two of the major textile factories producing army attire. State Z has no choice but to conclude a contract with a South African company in terms of which the company would supply camouflage army uniforms to State Z for one year in return for payment. The company delivers the clothing as per the agreement, but State Z fails to pay. The company wishes to institute an action against State Z in a South African court, claiming the outstanding payments. When rumours start circulating that President Ruel himself is about to visit South Africa, the CEO of the company begins to wonder whether President Ruel may be prosecuted in a South African court for the crimes he has committed in State Z. You are the company’s legal advisor. Write a well-substantiated legal opinion in which you discuss sovereign immunity on the one

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hand, and Head of State immunity on the other, in order to explain whether State Z and President Ruel (respectively) will be able to raise immunity before South African courts. [25]

State Z's immunity in a South African court (sovereign immunity)

The theory of restricted sovereign immunity entails that a state is, in principle, immune from being questioned in the courts of another state, but it loses this immunity when it descends into the marketplace. When a state acts as an ordinary trader it is expected to honour its obligations and is subject to the laws which all ordinary traders must abide by. Therefore, we must distinguish between:

1) Public governmental acts (*acta iure imperii*): if claims arise from such acts, the acting state will be immune from the jurisdiction of another state's courts.
2) Commercial activities (*acta iure gestionis*): a state will not be immune from jurisdiction if claims arise from these activities.

In the South African *Inter-Science* case, the court concluded that the theory of restricted sovereign immunity was a general rule of international law, and applied it.

In terms of the Foreign States Immunities Act, a foreign state is not immune from the jurisdiction of municipal courts when the proceedings relate to a "commercial transaction" into which that state has entered. "Commercial transaction" is defined in the Act as: 1) any contract for the supply of goods and services

2) any loan or transaction for the provision of finance…
3) any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters… otherwise than in the exercise of sovereign authority.

The general rule of the Foreign States Immunities Act is that you look at the nature of the transaction rather than the purpose, to determine whether the act is *imperii* or *gestionis*. However, the American *Victory Transport* case laid down acts which can be regarded as *imperii*:

- Internal administrative acts
- Legislative acts
- Acts related to armed forces
- Acts related to diplomatic activity
- Public loans

In our case the state has bought army attire from a South African company. At first glance this is an act related to armed forces, and therefore will be regarded as *imperii*. However, having regard to the nature of the contract (purchase and sale contract), it could be regarded as commercial activity. In the American case of *Aerotrade v Republic of Haiti*, the Republic of Haiti was successful in raising immunity against a claim for payment for military equipment supplied to it for use by its armed forces.

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President's immunity for international crimes (head of state immunity)

The Diplomatic Immunities and Privileges Act provides that a head of state is immune from the criminal and civil jurisdiction of the courts of the Republic and enjoys the same privileges as:

a. heads of state enjoy in accordance with the rules of customary international law
b. are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state, or
c. may be conferred on such a head of state by virtue of section 7(2)

At the moment, head of state immunity is a hotly debated issue in international law:

- The *Pinochet* case was a British case. Pinochet, a former Chilean head of state, was arrested on an extradition request while he was on a visit to Britain. He claimed that he enjoyed absolute immunity from extradition proceedings. The House of Lords found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity for acts performed in the "exercise of his functions as head of state". Where the acts complained of were not act which fell within the office of a head of state, he no longer enjoyed immunity.
- In the *Ghaddafi* case, a complaint was filed in the French court against Gaddafi, the Libyan leader. It claimed that the Libyan government was involved in the bombing of an aircraft which killed French citizens. However, the French prosecutor filed a motion for the annulment of the proceedings on the basis of the principle of immunity of heads of state. The court in this instance accepted the plea of immunity and declined jurisdiction.

From the *Pinochet* and *Gaddafi* cases a very clear distinction between serving and former heads of state emerges - a serving head of state is absolutely immune, while a former head of state may well lose immunity and be liable.

With growing international pressure for heads of state to be liable for their actions, a recent resolution adopted by the Institute of International Law provides guidance. At the moment the provisions of the resolution can only be classified as non binding "soft law". The main provisions of the resolution provide the following:

- For the period in which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
- A former head of state enjoys immunity solely in respect of acts which are performed in the exercise of official functions.
- It is expressly stated that they may be prosecuted for acts constituting a crime under international law, or misappropriation of the state's assets or resources.

In our case we are dealing with a serving head of state, so it would appear that he is immune.

Write a legal opinion on the scope and extent of diplomatic immunity. Include in your discussion the inviolability of diplomatic missions, as well as the question of whether the

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premises of a mission are extraterritorial or not. You must substantiate your answer fully with reference to appropriate legal authority. [25]

Diplomats and consuls are state agents appointed to represent their states in foreign countries for specific purposes.
Diplomats by and large represent their states, protect the interests of their nationals, act as representatives of their government in negotiations with the government of the host state, report on conditions in the host state, and promote friendly relations.

In international law, the protections of diplomats is laid down in the Vienna Convention on Diplomatic Relations. In South Africa, these matters are regulated by the Diplomatic Immunities and Privileges Act.

Diplomats and embassies need immunity so that the mission is able to perform its functions. Diplomatic immunity is generally divided into two "legs": Diplomatic premises (embassies); and the person of the diplomat.

Immunities/privileges of diplomatic premises:

- May not be entered by the host state without permission of the ambassador.
- Premises, furniture, property, cars etc may not be searched, requisitioned, attached, or sold in execution.
- Embassy archives, correspondence, post bags etc may not be opened, searched, or seized.
- Diplomatic premises remain part of the host state's territory they are not part of the sending state - this was confirmed in *Santos v Santos*.

Immunities/privileges of the person of the diplomat:

- A diplomat may not be arrested or detained (it is a criminal offence to do so).
- A diplomat is absolutely immune from criminal jurisdiction.
- A diplomat is immune from civil jurisdiction unless the action involves real action for immovable property held in personal capacity; matters of succession in private capacity; professional or commercial activities outside of official functions. - A diplomat is not obliged to give evidence as a witness.
- This immunity extends to the diplomat's family.

As with sovereign immunity, diplomatic immunity can also be waived. A diplomat may not be arrested even for an act endangering the state. The person should rather be declared a *persona non grata* and expelled from the country.

Temba is an artist from Pretoria who concludes an agreement with the government of Goldava. The agreement stipulates that he will paint a portrait of the wife of the Goldavian Ambassador

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to South Africa (Mrs Nip), which is to be hung on the wall of the Ambassador's office, and that in turn he will be paid R10000 as a deposit before he starts working and R25000 when his work is completed. He receives the deposit in good time. A month later the portrait is finished, and he shows it to Mrs Nip at the embassy. Mrs Nip is not satisfied with the way in which she has been depicted by Temba. Temba quietly insists that the portrait is lifelike and as requested. Mrs Nip loses her temper and throws her paperweight at Temba. Temba is seriously injured and taken to hospital. When

his condition improves he approaches you for legal advice. With reference to authority, advise Temba whether Mrs Nip can be arrested and charged with assault; whether the embassy premises can be searched for the paperweight which was allegedly used in the assault, and whether Temba can institute an action in a South African court claiming R25000 from the Goldavian government. [25]

Diplomats and embassies need immunity so that the mission is able to perform its functions.
In international law, the protection of diplomats is laid down in the Vienna Convention on Diplomatic Relations. In South Africa, these matters are regulated by the Diplomatic Immunities and Privileges Act. The DIPA provides for immunities/privileges of diplomatic premises, and immunities/privileges of the person of the diplomat:

Immunities/privileges for the diplomatic premises

- May not be entered by the host state without permission of the ambassador.
- Premises and property thereon may not be searched, requisitioned, attached or sold in execution.
- Embassy archives, correspondence, post bags etc may not be opened or seized.
- The diplomatic premises remain part of the host state's territory they are not part of the sending state - this was confirmed in *Santos v Santos*.

Immunities/privileges for the person of the diplomat

- A diplomat may not be arrested or detained (it is a criminal offence to do so).
- A diplomat is absolutely immune from criminal jurisdiction.
- A diplomat is immune from civil jurisdiction unless the action involves a real action for immovable property held in personal capacity; matters of succession in personal capacity; professional or commercial activities outside of official functions. - A diplomat is not obliged to give evidence as a witness.
- This immunity extends to the diplomat's family.

As the ambassador's wife, Mrs Nip enjoys diplomatic immunity. She therefore cannot be arrested or charged, and the diplomatic premises cannot be entered or searched (unless immunity has been waived).

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The theory of restricted sovereign immunity entails that a state is in principle immune from being questioned in the courts of another state, but it loses this immunity when it descends into the marketplace. We must therefore distinguish between:

1) Public governmental acts (*acta iure imperii*): if a claim arises from such acts, the acting state will be immune from jurisdiction.
2) Commercial activities (*acta iure gestionis*): a state will not be immune from jurisdiction if claims arise from these activities.

In terms of the Foreign States Immunities Act, a foreign state is not immune from the jurisdiction of municipal courts when proceedings relate to a "commercial transaction" into which that state has entered. "Commercial transaction" is defined as:

a. any contract for the supply of goods and services
b. any loan or transaction for the provision of finance…
c. any other transaction or activity of commercial, industrial, financial, professional or other similar character (not made in the exercise of sovereign authority)

The general rule is that you look at the nature of the transaction, rather than the purpose, to determine whether or not the act is an *acta iure imperii* or *acta iure gestionis*. However, the American *Victory Transport* case laid down acts which can be regarded as *imperii*:

- Internal administrative acts
- Legislative acts
- Acts related to armed forces
- Acts related to diplomatic activity
- Public loans

The contract for the painting of the portrait falls under the definition of a "commercial transaction" in terms of the Foreign States Immunities Act and is therefore one of the exceptions to sovereign immunity. Temba may, therefore, institute an action in a South African court.

Using case law, analyse the practical problems that arise in respect of immunity with regard to acts related to the armed forces and to diplomatic activity. Discuss the concepts of acts *iure imperii* and *iure gestionis* in your answer. [25]

Acts *iure imperii* are public governmental acts. If a claim arises from such acts, the acting state will be immune from jurisdiction.
Acts *iure gestionis* are commercial activities. If a claim arises from these activities, a state will not be immune from jurisdiction.

In order to determine whether an act is *iure imperii* or *iure gestionis*, as is evident from the wording of the Foreign States Immunities Act, one must look at the nature of the contract, rather than its purpose.

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In terms of the provisions of the Foreign States Immunities Act, a foreign state is not immune from the jurisdiction of municipal courts when the proceedings relate to a "commercial transaction" into which the state has entered. "Commercial transaction" is defined in the Act as:

a. any contract for the supply of goods or services
b. any loan or other transaction for the provision of financial services…
c. any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters or engages otherwise than in the exercise of sovereign authority

The American *Victory Transport* case laid down acts which can be regarded as *imperii*:

- Internal administrative acts
- Legislative acts
- Acts related to armed forces
- Acts related to diplomatic activity
- Public loans

The practical problems that arise in respect of immunity with regard to acts related to armed forces and diplomatic activity can be illustrated by the following example:
Suppose there is a contract of purchase and sale in terms of which State A buys tyres for its army trucks from a South African company. At first glance, this is an act related to armed forces, but it would also fall within the scope of a "commercial transaction" because the nature of the contract, not its purpose, is relevant. Therefore State A would not be immune from jurisdiction. However, Dugard highlights the fact that courts are likely to be weary in asserting jurisdiction over any matter related to the armed forces.

In the American case of *Aerotrade v Republic of Haiti*, Haiti was successful in raising immunity against a claim for payment for military equipment supplied to it for use by its armed forces.

Write an essay in which you explain how the restricted approach to sovereign immunity has gradually become part of South African law. You must discuss applicable South African case law and legislation in your essay.

Sovereign immunity has its roots in the immunity of the person of the foreign sovereign (the king) from municipal courts' jurisdiction. Later, this immunity was accepted as belonging to the state and its organs. In other words, the acts of the head of a foreign state, its government, and its government departments cannot be challenged in municipal courts.

According to the theory of absolute sovereign immunity, a state was always immune from prosecution in the courts of another state with regard to all acts it performed.

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The theory of restricted sovereign immunity entails that a state is, in principle, immune from being questioned in the courts of another state, but it loses this immunity when it descends into the marketplace. One must therefore distinguish between:

1) Public governmental acts (*acta iure imperii*): if claims arise from such acts, the acting state will be immune from the jurisdiction of another state's courts.
2) Commercial activities (*acta iure gestionis*): if claims arise from such acts, the acting state will not be immune from jurisdiction.

Initially, South African courts applied the theory of absolute immunity. The turning point was the *Inter-Science* case, where the court concluded that the theory of restricted sovereign immunity was a general rule of international law, and applied it. The *Inter-Science* decision was approved by the court in the *Kaffraria Property* case.

The position of restricted sovereign immunity in South African law was "solidified" by legislation in the form of the Foreign States Immunities Act. This Act provides that foreign states are immune from the jurisdiction of South African courts, but there are exceptions to this general rule:

1. Waiver

A state is immune if it expressly waives its immunity

- in writing before the cause of action arises
- in writing after the dispute has arisen
- or tacitly, for example where the foreign state itself institutes the action

2.Commercial transactions. A commercial transaction is:

- a contract for the supply of services or goods
- a loan or the provision of finance…
- any other activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters or engages in otherwise than in the exercise of sovereign authority

Whether or not a transaction is of a commercial nature or not is determined by the nature of the transaction and not its purpose.

3.Contracts of employment. A foreign state will not be immune if it enters into a contract of employment and

- the contract is concluded in South Africa
- the work must be completed entirely or in part in South Africa, and
- when the contract was concluded, the individual involved was a South African citizen, or was a resident in South Africa, and
- when the action was instituted, the individual was not a national of a foreign state

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Using the Diplomatic Immunities and Privileges Act as your starting point, discuss head of state immunity and the implications that international developments (cases, resolutions, etc) may have on the South African law. [25]

The DIPA provides that a head of state is immune from the courts of the Republic and enjoys the same privileges as

a. heads of state enjoy in accordance with the rules of customary international law.
b. are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state.
c. may be conferred on such a head of state by virtue of section 7(2)

At the moment, head of state immunity is a hotly debated issue in international law:

- The *Pinochet* case was a British case. Pinochet, a former Chilean head of state, was arrested on an extradition request while he was visiting Britain. He claimed that he enjoyed absolute immunity from extradition proceedings. The House of Lords found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity for acts performed in the "exercise of his functions as head of state". Where the acts complained of were not acts which fell within the office of a head of state, he no longer enjoyed immunity.
- In the *Gaddafi* case, a complaint was filed in the French court against Gaddafi, the Libyan leader. It claimed that the Libyan government was involved in the bombing of an aircraft which killed French citizens. However, the French prosecutor filed a motion for the annulment of the proceedings on the basis of the principle of immunity of heads of state. The court in this instance accepted the plea of immunity and declined jurisdiction.

A distinction is drawn between immunity that attaches to the person because of their office and immunity that relates to acts performed in an official capacity. Immunity *ratione personae* attaches to senior state officials while they are still in office. Immunity *ratione materiae* attaches to official acts and can be invoked by both serving and former officials in respect of acts performed while they were still in office.

With growing international pressure for heads of state to be liable for their actions, a recent resolution adopted by the Institute of International Law provides guidance. At the moment, the provisions of the resolution can only be classified as non binding "soft law". The main provisions provide the following:

- For the period during which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
- A former head of state or government enjoys immunity solely in respect of acts which are performed in the exercise of official functions.
- It is expressly stated that he/she may be prosecuted for acts constituting a crime under international law, or misappropriation of the state's assets or resources.

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IMMUNITY AS AN EXCEPTION TO JURISDICTION

A former African head of state, Mr Pur Evil, decides to retire in Europe thanks to the proceeds of many years of corruption when he was president of a small African country. He settles in Belgium and soon a warrant is issued for his arrest on the grounds of crimes against humanity and misappropriation of state assets. He claims immunity. Using relevant legislation, case law and developments in international law, discuss whether or not his claim to immunity is valid on an international level and what the situation would have been if he had settled in South Africa. [25]

A distinction is drawn between immunity *ratione personae* (immunity that attaches to the person because of his status or office) and immunity *ratione materiae* (immunity that relates to acts performed in an official capacity). Immunity *ratione personae* attaches to senior state officials while they are still in office. Immunity *ratione materiae* attaches to official acts and can be invoked by both serving and former officials in respect of acts performed while they were in office.

The following foreign cases illustrate recent state practice:

- ***R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No 3)* 1999 2 All ER 97 (HL) - The *Pinochet* case**

Pinochet, a former Chilean head of state, was arrested while on a visit to Britain on an extradition request from Spain. He claimed that he enjoyed absolute immunity from the extradition proceedings. The House of Lords found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity only for acts performed in the 'exercise of his functions as head of state'. Where the acts complained of
torture and human rights violations) were not acts which fell within the office of a head of state, he no longer enjoyed immunity.

- **The *Ghaddafi case: Cour de Cassation* 13.3.2001 (2001) 12 *European Journal of International Law* 595**

A complaint was filed in the French *Cour de Cassation* against Ghaddafi, the Libyan leader. It was claimed that the Libyan government was involved in the bombing of an UTA aircraft, in September 1989, which caused the death of 156 passengers and 15 crew members, including French citizens. The complaint was filed by an NGO and some relatives of the victims. However, the French

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prosecutor filed a motion for the annulment of the proceedings on the basis of the principle of the immunity of heads of state. The court in this instance accepted the plea of immunity and declined jurisdiction.

With growing international pressure for heads of state to be liable for their actions, the recent resolution, "The Immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International Law", adopted by the Institute of International Law is interesting. At the moment the provisions of the resolution comprise a source of non-binding 'soft-law'. The resolution, which claims to be based on present state practice, aims at ensuring that the head of state can exercise functions and responsibilities in an effective manner. The immunities are restricted to the minimum. The head of state remains subject to private law that protects creditors and other individuals. It also provides that the head of state has no immunity regarding the misappropriation of his own state's assets. Other states are also placed under an obligation to assist with the restitution of such assets to the state to which they belong.

The main provisions of the resolution provide the following:

- For the period in which they are in office, heads of state or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
- A former head of state or government enjoys inviolability or immunity solely in respect of acts which are performed in the exercise of official functions (*ratione materiae*).
- It is expressly stated that he may be prosecuted for
- acts constituting a crime under international law; or · misappropriation of the state's assets or resources.

This resolution is still regarded as soft law and has not yet achieved customary international law status.

In South African legislation, section 4(1) of the DIPA provides that a head of state is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as

(a) heads of state enjoy in accordance with the rules of customary international law; (b) are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state; or

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(c) may be conferred on such a head of state by virtue of section 7(2)

Secondly, in section 4(2) a special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as 14

(a) a special envoy or representative enjoys in accordance with the rules of customary international law;
(b) are provided for in any agreement entered into with a state, government or organisation whereby immunities and privileges are conferred upon such special envoy or representative; or
(c) may be conferred on him or her by virtue of section 7(2).

South Africa, when it incorporated the Implementation of the Rome Statute of the International Criminal Court of 2002 in s 4 provides:
'Despite any other law to the contrary, including customary and conventional international law, the fact that a person –
(a) is or was a head of State or government, a member of a government or parliament, an elected representative or a government official:
is neither –
(i) a defence to a crime; nor
(ii) a ground for a possible reduction of sentence once a person has been convicted of a crime.
In this case, we are dealing with a former HoS, therefore the argument is that he will not enjoy immunity.

LISTS THAT CAN BE MEMORISED

Usus and opinio iuris:

Usus

1. Need not be "universal", widespread usage sufficient (*Fisheries Jurisdiction*).
2. Can develop between 2 or a few states -> local custom (*Right of Passage over Indian Territory*).
3. Number of states not as important as identity of states.
4. Number of repetitions necessary depends on nature of the rule.
5. Duration of persistence of practice depends on nature of the rule (*S v Petane* -> outer space).
6. Practice must be characterised by substantial compliance (*Nicaragua*).
7. Persistent objector not bound if persistently objected during development of rule (*North Sea Continental Shelf*).

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Opinio iuris

1. States must feel that they are conforming to what amounts to a legal obligation (*North Sea Continental Shelf*).

A state may formulate a reservation to a treaty unless (Article 19 VC):

1. Treaty prohibits the reservation.
2. Treaty provides that only specific reservations may be made.
3. The reservation is incompatible with the object and purpose of the treaty.

Theories of succession to treaties:

1. Theory of universal succession.
2. Clean slate theory.
3. Theory of provisional succession.

Requirements for self-defence (Article 51 UN Charter):

1. An armed attack must occur.
2. The purpose for the use of force must be clear: to defend oneself.
3. The force exercised in self-defence must be proportionate to the posed threat.
4. The act of exercising the right to self-defence is valid only until the Security Council acts.

Traditionally recognised sources of public international law:

1. International agreements (treaties) (Article 38(1)(a)).
2. International custom (Article 38(1)(b).
3. The general principles of law recognised by civilised nations (Article 38(1)(c).
4. Judicial decisions and “the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law” (Article 38(1)(d)).

Three principles set out in the *Lotus* case:

1. One state cannot exercise jurisdiction in the territory of another unless they have agreed thereto.
2. One state may exercise jurisdiction in its own territory over acts that happened in the territory of another state unless an international law rule forbids this.
3. The territoriality of criminal cases is not absolute.

Bases of jurisdiction:

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1. Territoriality.
2. Effects (subjective and objective territoriality).
3. Nationality.
4. Passive personality.
5. State protection.
6. Universality.

Requirements for *rebus sic stantibus* (Article 62 VC):

1. Existence of circumstances were essential basis for conclusion of treaty.
2. The circumstances (which have purportedly changed) exist at the time of treaty conclusion.
3. The change of circumstances must drastically transform the extent of the states' obligations.
4. The change of circumstances must have been unforeseen by the parties.
5. May not be raised to terminate treaties that establish boundaries.
6. May not be raised by the state party responsible for the change.

Grounds available for the termination of a treaty:

1. Fulfilment of obligations.
2. Consent.
3. Treaty provision.
4. Conclusion of a new treaty.
5. Res sic stantibus.
6. Impossibility of performance.
7. Ius cogens.
8. Unilateral repudiation.
9. Breach of treaty.
10. War and suspension of diplomatic/consular relations.

Requirements for statehood:

1. Permanent population.
2. Defined territory.
3. Effective government.
4. Capacity to enter into international relations.
5. Recognition.

Things international organisations can do:

1. Sue and be sued.
2. Enter into contractual and international agreements with other international organisations and states.
3. Acquire, own, transfer property.

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4. Pursue legal remedies and enjoy rights and duties under international law.

Methods of enacting a treaty into national legislation:

1. Writing the provisions of the treaty into an Act of Parliament.
2. Enacting the treaty as a Schedule to an Act of Parliament.
3. An Act of Parliament may provide that a treaty will be incorporated by publication in the *Government Gazette*.

People who are presumed to be able to validly conclude binding treaties *ex officio*:

1. Heads of state.
2. Heads of government.
3. Heads of diplomatic missions (ambassadors/consuls).
4. State representatives at treaty-making conferences.

Enforcement measures available to states in international law:

1. Reprisal.
2. Retortion.
3. Boycott/Embargo.
4. Sanction.
5. Diplomatic action.
6. Self-defence.
7. Use of force authorised by Security Council.
8. Hot pursuit.

Situations in which the International Criminal Court may exercise jurisdiction:

1. At least one of the parties involved is a state party.
2. Accused is a national of a state party.
3. Crime committed on the territory of a state party.
4. A state not party to the Rome Statute may decide to accept the court's jurisdiction over a specific crime committed within its territory, or by its national.
5. The Security Council refers a situation to the prosecutor.

Definition of "commercial transaction" as per Foreign States Immunities Act:

1. A contract for the supply of services or goods.
2. A loan or transaction for the provision of finance…
3. Any other transaction or activity of a commercial, industrial, financial, professional or other similar character into which the foreign state enters otherwise than in the exercise of sovereign authority.

Acts regarded as *acta iure imperii* in the American *Victory Transport* case:

1. Internal administrative acts.

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2. Legislative acts.
3. Acts in relation to diplomatic activity.
4. Acts in relation to armed forces.
5. Public loans.

Privileges afforded to the Head of State as per the Diplomatic Immunities and Privileges Act (...the same privileges as):

1. Heads of State enjoy in accordance with customary international law.
2. As provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a Head of State.
3. May be conferred upon such a Head of State by virtue of section 7(2).

Main provisions of the resolution adopted by the Institute of International Law:

1. For the period in which they are in office, Heads of State or government enjoy personal inviolability and absolute immunity from criminal jurisdiction.
2. A former Head of State enjoys immunity solely in respect of acts which are performed in the exercise of official functions.
3. It is expressly stated that they may be prosecuted for acts consisting of a crime under international law, or misappropriation of the state's assets or resources.

Immunities/privileges of diplomatic premises in terms of the Diplomatic Immunities and Privileges Act:

1. May not be entered by the host state unless permission from ambassador.
2. Premises and property thereon may not be searched, requisitioned, attached, or sold in execution.
3. Embassy archives, correspondence, post bags etc may not be opened, searched, or seized.
4. Diplomatic premises remain part of the host state's territory they are not part of the sending state - this was confirmed in *Santos v Santos*.

Immunities/privileges of the person of the diplomat in terms of the Diplomatic Immunities and Privileges Act:

1. May not be detained or arrested (it is a criminal offence to do so).
2. Is absolutely immune from criminal jurisdiction.
3. Is immune from civil jurisdiction, unless action involves a real action for immovable property held in personal capacity; matters of succession in personal capacity; professional or commercial activities outside of official functions.
4. Is not obliged to give evidence as a witness.
5. This immunity extends to the diplomat's family.

Brownlie's test for effective government:

1. Does it have its own executive organs?

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2. Does it conduct relations through these organs?
3. Does it have an independent legal system?
4. Does it have its own courts?
5. Does it have its own nationality?

CONSTITUTIONAL PROVISIONS

Section 231

(1) The negotiating and signing of international agreements is the responsibility of the national executive.
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
(3) An international agreement of a technical, administrative, or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly or National Council of Provinces, but must be tabled in the Assembly and Council within a reasonable time.
(4) Any international agreement becomes law in the Republic when it is enacted into law by legislation; but a selfexecuting provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

TUTORIAL ASSIGNMENTS

FEEDBACK ON COMPULSORY ASSIGNMENT 01 – 2011

Question 1

Four states (A, B, C and D) conclude a treaty regulating their trade relations.
State A enters a reservation to one of the articles of the treaty. The reservation is not forbidden by the provisions of the treaty and it does not contradict its object and purpose. State B does not respond to the reservation, while states D and C object to the reservation. With reference to relevant authority, explain the consequences of A's reservation to the operation of the treaty between the parties. (15 marks.)

Reservations to treaties are governed by articles 19 to 23 of the Vienna Convention on the Law of Treaties, 1969

Answer:
Definition of reservation: A reservation is an offer by the reserving slate to the other parties to a multilateral treaty, proposing that the agreement between them will have a certain content

Article 19.

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Formulation of reservations.

A State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:

- The treaty forbids reservations
- The treaty only allows certain reservations
- The reservation proposed is contrary to the object and purpose of the treaty.

The General rule is that all treaties can be accepted subject to reservations. If the treaty is silent on the question of reservations it is assumed reservations are allowed.

Parties to a multilateral treaty may accept or reject the reservation. Failure to object will be seen as tacit consent. (As is the case where the party does not respond to the reservation)

A state, which objects to a reservation, may do one of 2 things.

1. Object to the reservation but not to the operation of the treaty, or
2. Object to the reservation and to the treaty coming into operation.

In the first case the treaty will operate minus the offending clause and in the second case no treaty will operate between the states.

Effect of reservation on a multilateral treaty:

Obligations between states accepting the reservation and the reserving state:

- Acceptance may be express or tacit.
- The entire treaty applies between the parties.
- But the provision in the original treaty to which the reservation was entered will be replaced by the provisions in the reservation. E.g. if states A, B and C accept a reservation entered by D, the treaty will apply normally between A, B and C. it is only the relationships between D and the other states which are affected by the reservation.

Obligations between states rejecting the reservation and the reserving state:

- Rejection must be express.
- The reservation doesn't come into operation between the rejecting and the rejecting state - there is no consensus.
- But the clause to which the reservation is entered also cannot apply and is removed from the treaty for those parties.
- The rest of the treaty applies between the parties. If a state rejects the reservation and the treaty coming into operation, the treaty will not operate between the 2 states.

Procedure regarding reservations.

1. **A reservation**, an **express acceptance of a reservation** and **an objection to a reservation** must be formulated in writing and communicated to the contracting States and other States entitled to become parties to the treaty.

Application

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If a state does not object to a reservation (within 12 months of having been informed of the reservation, or within 12 months of expressing consent to be bound by the treaty) , it will be deemed to have consented to the reservation.
State B therefore is deemed to have tacitly accepted the reservation. States D and C expressly object to the reservation. We can assume they have objected to the reservation only, and not to the treaty coming into operation as a whole.

As a result:

- As between A and B: the entire treaty operates between them, but the provisions of the original treaty to which a reservation has been entered to will be replaced by the provisions of the reservation.
- As between A and D: The reservation does not come into operation between the two states, since there is no consensus. Likewise, the provision of the original treaty to which the reservation was entered, does not come into operation between them, because there is no consensus. Therefore, the treaty will apply between them minus the provision to which A entered a reservation. The created "gap" will be governed by applicable principles of customary international law.
- As between A and C: same as between A and D..
- As between B, C and D: the treaty in its original form will apply, since the treaty obligations between all non-reserving parties remain unaffected by the reservation.

Question 2.

It is said that public international law has a dual function in the South African Constitution of 1996. Discuss this statement critically. Use sections 231 and 233 to highlight the difference in these two functions, and the practical effect which they may have on the application of public international law in South African municipal law. (15 marks.)

Answer:

International legal principles may be applied directly as law in South Africa, in order for a court to reach a decision on a case that has come before it.

Thus treaties, which have become part of South African law as provided for in section 231(4) (on which we will focus presently), or customary international law, which is part of South African law subject to the provisions of section 232 (which is not part of this question, but which we mention for the sake of clarity) will be applied directly by our courts.

International law may also be used to interpret provisions of our law, be it

- the Bill of Rights (section 39(1)), or
- our common law and customary law (section 39(2)), or legislation (section 39(2); section 233).

In this question, we will focus on the latter.

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Section 231.

This section provides, among other things:

(4) Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

This section sets out the process in which treaties would apply in South Africa.

Unless the provision of a treaty is self-executing, it will have to be transformed into municipal legislation. This can be done in the following number of ways:

(1) the provisions of the treaty are rewritten in an Act of parliament — see, for example, the Civil Aviation Offences Act 10 of 1972

(2) the treaty is enacted as a schedule attached to an Act of parliament — see, for example, the Diplomatic Immunities and Privileges Act 74 of 1989

(3) an Act of parliament may provide that a treaty will be incorporated by publication in the *Government Gazette* — see, for example, section 108 of the Income Tax Act.

What is important to understand is that whatever legislative shape the treaty takes, the end result of the process will be that its provisions can be applied directly by the South African courts.

Section 233: provides as follows:

When interpreting any legislation, every court **must** prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

One of the purposes of this section is **to promote harmony between international law and municipal law**. As a result of its provisions, international law finds indirect application within the domestic legal system.

This position is similar to the one we encountered under section 39. In other words, what is being applied directly is the actual legislative provision, but its meaning (the one which the court has found to be international law compliant) will have been determined by international law.

The latter will therefore permeate South African law not directly, but indirectly: the interpretative process will have inculcated the legislative provision with the relevant international law principle.

International law, in this context, includes customary international law that has been incorporated, as well as unincorporated treaties to which South Africa is a party. There is a presumption that in enacting legislation, legislature did not intend to violate South Africa's international obligations.

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Lastly, some statutes may specify that international law should be used in their interpretation. For example, the Implementation of the Rome Statute of the
International Criminal Court Act 27 of 2002 provides that when a court applies the Act, it must consider international conventions and international custom.

The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 stipulates that those interpreting the statute may be mindful of international law. The Refugees Act 130 of 1998 stipulates that the Act is to be interpreted and applied with due regard to relevant conventions and the 1948 universal Declaration of Human Rights.

But even if such specific instructions are not included in the legislative text, the provisions of section 233 mandate the indirect application of international law in cases where an international element is present, and the court is required to interpret the provisions of a relevant statute.

FEEDBACK ON THE OCTOBER-NOVEMBER 2009 EXAM.

Question 1.

Write a paragraph explaining how the type of sanctions available for violation of national (domestic) laws within a state differs from the type of sanctions available at an international level against states which have violated international law. [10 marks.]

ENFORCEMENT MEASURES ARE MEASURES LIKE SANCTIONS, EMBARGO, RETORTION, ETC.

Answer:

Municipal (national law) judgments are backed by the complete executive machinery of the state in the form of a police force.

In international law, there is no central executive authority with a police force at its disposal to enforce judgments. At the international level, the Security Council (S-C) does have some "sanctions" that can be used: Chapter 7 of the United Nations Charter allows the S-C to direct its members, either individually or collectively, to use force against a state whose violation of international law constitutes a threat to international peace. The S-C can also use of economic sanctions against an offending state.

States can also resort to self-help. The different types of actions that can be taken include:

- reprisals;
- retortion;
- self-defence;

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- embargo and boycott;
- sanctions;
- diplomatic action.

The enforcement mechanisms may seem to be violations of the nemo judex rule in circumstances when states do not enroll the help of an outside agency, such as the Security Council.

But even measures which involve outside agencies also have elements of self-help.

Remember, the fact that we mention these mechanisms in the context of a violation of the nemo judex in sua causa rule does not mean they are not permitted in international law. They will be valid if all the requirements have been met.

Question 2.

South Africa (represented by her Minister of Health), the United States of America (represented by her President), and the Republic of Zeldonia (represented by one of her provincial premiers) meet at a conference in Washington, DC.. They conclude an agreement entitled "Treaty for the Ethical Implementation of Stem Cell Research".Analyse the facts in this scenario with respect to the requirements for the conclusion of a treaty set out in the 1969 Vienna Convention on the Law of Treaties and explain whether a valid treaty has been concluded between the three states. [15 marks.]

Answer:

According to Article 7(1) and (2) of the Vienna Convention, the following persons may validly conclude binding treaties on behalf of their states:

Article 7(1) V-C: Those persons who:

- **Produce appropriate full powers; or,**

- **Art 7(2) VC: certain people presumed to bind the state due to the positionsthey hold:**

SIGNATURE

- Head of state (president)
- Head of government (prime minister)
- Minister of foreign affairs
- Head of diplomatic mission (ambassador/consul) State representatives at treaty-making conferences.

The question is whether the agreement is a treaty, and from the set of facts, whether a minister of health, a president and a provincial premier have signed the agreement. In terms of article 7(a), the president can sign without producing full powers.

The Minister of Health is not a person listed in article 7(2) and would have to produce full powers.

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A premier of a province is not mentioned as a person who can bind the state ex officio (as a result of the positions they hold - art 7(2)(a), (b), (c) of the V-C). Unless the premier produces full powers (documents issued by the state declaring that the person named in them has the authority to bind the state) or there is a practice that the premier has bound the state under similar circumstances (article 7(1) of the V-C), he or she does not have the power to conclude a treaty which binds the state.

The fact that the agreement is called a treaty does not mean that it is indeed one. Each agreement must be tested on its own merits. Our conclusion is therefore that the agreement is not a treaty, unless the Minister of Health and the provincial premier have produced full powers. As the facts do not mention full powers, the agreement is not a treaty and is therefore unenforceable in international law.

Question 3.

State A and state B have joined forces to invade state C in search of weapons of mass destruction. However, the sentiment amongst the international community is that the reason for the invasion is unfounded and that the situation poses a threat to international peace and security. The resolution brought before the Security Council of the United Nations calling for the withdrawal of state A and state B's troops is vetoed by one of the permanent members of the Security Council.

3.1. Briefly discuss the international legal personality of international organisations and their general characteristics. [10 marks.]

An international organisation (I-O) is made up of states (or other international organisations).

- It has a limited international legal personality because its legal personality depends on its creators' discretion.

- International organisations are limited by their respective constituent charters (the agreements that establish them). They must be created by virtue of an international agreement among states.

Even though international organisations do not have a capacity as extensive as that of states, they can act independently on the international plane. This was confirmed by the I-C-J in Reparation for Injuries Suffered in the Service of the United Nations (1949) I-C-J.

In this case, the I-C-J was asked to find whether the UN could exercise diplomatic protection over its agents and also institute action on their behalf for injuries suffered in the course of their duties. The exercise of diplomatic protection and the institution of a claim for harm to a national are both capacities which typically accrue to a state. By finding that the UN could in fact do both, the I-C-J recognised that it was a subject of international law enjoying international legal personality.

The extent of international legal personality enjoyed by international organisations differs. The powers of any given organisation depends on the purpose for which it was created and the functions and powers which it has been given. In Legality of the Use by a State of Nuclear Weapons in Armed Conflict I-C-J Rep 1996, the court remarked as follows:

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[International organisations are subject to international law [and] do not, unlike States, possess a general competence. International organisations are governed by the 'principle of speciality', that is to say, they are invested by the States which create them with powers, the limits of which are a function of the common interests whose promotion those states entrust to them.

As stated above, what an international organisation may or may not do, is set out in its founding document, or constituent charter, and may be further developed by practice.

General characteristics.

An international organization may:

-May sue and be sued
-Own, acquire or transfer property
-Enter into agreements with other states/IO
-Members are states/IO

If a member state grants independence to part of its territory, the new state will have to apply to become a member of the organisation, and for that reason it will have to comply with the requirements set for membership. It will not, therefore, automatically succeed to the mother state's membership.

3.2. In the light of the above-mentioned set of facts, explain whether this crisis arising from the veto has paralysed the United Nations, or whether the General Assembly could take some action. In your answer, you must discuss the powers of the General Assembly and the question whether the General Assembly has any authority pertaining to the maintenance of international peace and security. [10 marks.]

Answer:
The main purpose of the United Nations is to **maintain international peace and security**.

It does this through its principal organs, which are

- the General Assembly (G-A),
- the Security Council (S-C),
- the Economic and Social Council,
- the Trusteeship Council,
- the Secretariat and
- the International Court of Justice (I-C-J).

The primary organ charged with maintaining peace and security is the Security Council.

As with any international organisation, the G-A has only those powers which are given to it in the Charter. The G-A may consider and make recommendations to UN members or the Security Council (S-C) regarding the general principles of cooperation in the maintenance of peace and security.

It may also discuss and make recommendations on any matter relating to peace and security which is referred to it by a UN member, the S-C, or a non-member state.

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This is, however, subject to a very important proviso: the G-A must refer any question which requires action to the S-C before or after it (the G-A) has discussed the matter.

It may further alert the S-C to matters which are likely to endanger peace and security.

Furthermore, the G-A may make no recommendations on matters which are serving before the S-C, unless the S-C requests it to do so. When it comes to important matters, the G-A cannot act - it must defer to the S-C.. This is why it is said that the GA has only a "secondary" duty to maintain international peace and security which is the principal aim of the UN.

The G-A is therefore largely a discussion forum which makes recommendations to member states. Recommendations are precisely what the term says: recommended (as opposed to compulsory) courses of action.

From this you will see that in terms of the powers conferred on it, the G-A is not empowered to act: in other words, to actually enforce peace and security.

This it must refer to the S-C.. However, the five permanent members of the S-C (USA, UK, France, Russia and China) have what is termed veto power, in terms of which any of the five permanent members may veto any resolution before the S-C.. What this boils down to is that if one of the permanent members does not approve of proposed action to maintain international peace and security, it can kill it right there.

Does this then mean that the UN is paralysed? Remember that this will be a matter which is serving before the S-C and so the G-A's powers (of recommendation) will be even more restricted.

This "veto crisis" has in fact happened a number of times. Needless to say, the G-A was not particularly happy about it. In response, the G-A argues that although the S-C has the primary power for the maintenance of international peace and security, it does not have the sole power. Where the S-C can't or won't act and the body is "paralysed", the G-A draws on "residual powers" and can recommend "collective measures, including, in the case of a breach of the peace or act of aggression, the use of armed force". In other words, what the G-A is attempting to do here, is to expand the powers conferred on it in the Charter through creative interpretation.

This concept, which remains controversial, is embodied in the Uniting for Peace Resolution (G-A resolution 377(v) 1950).

Question 4.

According to Dugard, wide jurisdictional powers are conferred on South African courts in respect of offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. Name the grounds on which jurisdiction may be exercised by a South African court in terms of the provisions of this Act. [5 marks.]

Answer:

- Territory;

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- Active personality (nationality);
- Passive personality;
- Protection of the state;
- Any other basis recognised by law.

Question 5.

In June 1994 South Africa and State X conclude a treaty providing for their mutual cooperation with respect to the treatment and prevention of tuberculosis ("the 1994 Treaty"). One of the provisions of the treaty deals with the establishment of a Joint Tuberculosis Assistance Fund (J-T-A-F), the money from which is to be used to acquire and distribute the necessary medication to individuals who cannot afford to purchase it for themselves, and pay for these individuals' hospitalisation costs.In 1995 the South African Parliament expressly provides in a declaration that the treaty forms part of South African municipal law.

5.1. Consider the following situation: Mr Poor believes that he qualifies for free tuberculosis treatment as envisaged by the 1994 Treaty and the creators of the J-T-A-F. In 1997 he applies to the South African government in order to obtain it. His application is denied. The South African government argues that no assistance may be obtained from the JT-A-F at this stage, since the provisions of the treaty have not been enacted into South African municipal law. The Government refers extensively to Pan American World Airways incorporated versus S-A Fire and Accident insurance Co Ltd (1965). Analyse this argument with reference to the position of treaties in South African law at the time the treaty was concluded. [5 marks.]

Answer:

The legal position in this scenario is governed by the interim Constitution, 1993 (section 231(3)). This section provides as follows:

231(3) - Where Parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

This section therefore provides for constitutional ratification, which brings the treaty into effect in South African law.

This constitutional ratification - although falling short of the formal pre-constitutional statutory incorporation - must nonetheless be "expressly so provided". The meaning of "expressly so provides" was uncertain and academics in the country were divided on this question:

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- One group (including Dugard and Botha) felt that the situation had been liberalised and that a mere declaration by Parliament was sufficient to meet this criteria. This is also the procedure in fact followed by Parliament in a number of cases.

- Another group (Devine being the main protagonist) claimed that it represented a maintenance of the status quo (the existing position) and that parliamentary legislation was still required.

If one is to follow Botha's and Dugard's viewpoint, it would seem that the treaty in question has become part of S-A law and Mr Poor's application should not have been denied.

5.2 Suppose the treaty was concluded in 1997. Describe the procedure which must be followed in terms of the South African Constitution, 1996 before the treaty would become part of South African municipal law. [5 marks.]

Answer:

In the 1996 Constitution section 231(4) deals with the constitutional ratification of treaties, which is necessary before a treaty can become part of S-A domestic law.

Section 231(4) provides:

- Any international agreement becomes law in the Republic when it is enacted into lawby national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Thus ALL treaties, even those mentioned in section 231(3) must be translated into domestic law by a legislative process. There are three principal methods by which this may be accomplished, namely:

- **The provisions of the treaty are rewritten in an Act of Parliament**. See, for example, the Civil Aviation Offences Act 10 of 1972.

- **The treaty is enacted as a Schedule attached to an Act of parliament**. See, for example, the Diplomatic Immunities and Privileges Act 74 of 1989.

- **An Act of parliament may provide that a treaty will be incorporated by publication in the Government Gazette**. See, for example, section 108 of the Income Tax Act.

The exception to the above rule is found in the case of self-executing provisions in a treaty (short description or explanation of the concept of a self-executing treaty may also be credited).

5.3 Suppose the treaty was concluded in 1997 and Mr Poor's application was denied in 2008. His legal representative prepares an argument in which she refers to relevant South African legislation, as well as to the provisions of the Bill of Rights contained in the South African Constitution, 1996, namely the right of access to health-care services. Her argument is heavily substantiated with reference to international law. In response, the government claims that the reference to international law is unnecessary, and

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legally irrelevant.Analyse this argument with reference to the indirect application of international law as provided for in the Constitution. [15 marks.]

Answer:

The government's argument in this scenario is incorrect, since the Constitution provides for the indirect application of international law be it in the interpretation of the BoR, or interpretation of legislation.

In terms of section 39(1)(b) the court (or any tribunal or forum) must consider international law in order to interpret a provision in the Bill of Rights (B-o-R). In S versus Makwanyane it was stated that international law in this context refers both to binding and nonbinding international law.

International agreements and customary international law provide the framework within which the BoR can be evaluated and understood. Guidance on the interpretation of its provisions can be obtained from views expressed by the UN Committee on Human Rights and the European Commission on Human Rights, and from decisions of the Inter-American Court of Human Rights and the European Court of Human Rights. It must be remarked, however, that international law, which may advise the court in terms of section 39(1)(b), is not limited to international human rights law.

For example, in Prince versus President of the Law Society, Cape of Good Hope the court had to interpret the provision protecting religious freedom in the context of the use of cannabis for religious purposes. It was found that South Africa's international obligations pertaining to the suppression of drug abuse outweighed the international norms which protected religious freedom.

(Other examples of Constitutional Court cases in which international law was considered were also credited.)

In terms of section 39(2) any court, tribunal or forum is required to promote the spirit, purport and objects of the Bill of Rights when it develops the common law or customary law, or when it interprets legislation. Such spirit, purport and objects are linked to international law and the values and approaches of the international community.

Section 233 provides as follows:

- When interpreting any legislation, every court **must** prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

One of the purposes of this section is to promote harmony between international law and municipal law. As a result of its provisions, international law finds indirect application within the domestic legal system. This position is similar to the one we encountered under section 39. In other words, what is being applied directly is the actual legislative provision, but its meaning (the one which the court has found to be international law compliant) will have been determined by international law. The latter will therefore permeate South African law not directly, but indirectly: the interpretative process will have inculcated the legislative provision with the relevant international law principle.

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International law, in this context, includes customary international law that has been incorporated, as well as unincorporated treaties to which South Africa is a party. **There is a presumption that in enacting legislation, the legislature did not intend to violate South Africa's international obligations**.

Lastly, some statutes may specify that international law should be used in their interpretation. But even if such specific instructions are not included in the legislative text, the provisions of section 233 mandate the indirect application of international law in cases where an international element is present and the court is required to interpret the provisions of a relevant statute.

Therefore, contrary to the government's argument, the reference to international law is quite legally relevant.

SECTION B

Question 7: Immunity as an exception to jurisdiction [25 marks].

State A has a successful industry producing camouflage army attire. During a period of civil disturbance, its main factories are destroyed by government opponents. The government of State A finds a solution by concluding an agreement with a South African textile company. The agreement relates to the supply of camouflage army clothing to State A for three years with payment due in South Africa within fifteen days of each delivery of clothing to State A.. The company keeps delivering the required clothing on time, but no payment is forthcoming.The company institutes an action against State A in a South African court, claiming the payments which are in arrears. State A raises immunity in that as a sovereign state it cannot be called before the courts of another country without its consent.Based on these facts, write an essay discussing the two theories governing sovereign (state) immunity in international law and the merits of state A's argument. Substantiate your answer with reference to authority.

Answer:

According to the theory of **absolute sovereign immunity**, a state was always immune from prosecution in the courts of another state with respect to all acts that it performed. Proponents of this theory argue that all sovereigns were equal and one sovereign could not be subjected to the jurisdiction of another.

The theory of restricted (qualified) sovereign immunity entails that a state is, in principle, immune from being questioned in the courts of another state, but it loses this immunity when it descends into the market place. When a state acts as an ordinary trader it is expected to honour its obligations and it is subject to the laws which all ordinary traders must abide by. One must therefore distinguish between:

- public governmental acts

(acta iure imperii): if claims arise from such acts, the acting state will be immune from the jurisdiction of another state's courts commercial activities

(**acta iure gestionis):** a state will not be immune from jurisdiction if claims arise from these activities

It should also be noted that the 2004 UN Convention on Jurisdictional Immunities of States and Their Property approves the doctrine of restricted immunity in the field of commercial activities and its preamble

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proclaims that the jurisdictional immunities of states and their property are generally accepted as a principle of customary international law.

Today, many states (eg, Canada, USA, UK) **support the theory of restricted immunity** (which is the fairer of the two from the ordinary trader's point of view), although the UK (whose judicial practice in this regard has been followed by S-A courts) only approved of the restricted approach in 1976 (Trendtex Trading Corporation versus Central Bank of Nigeria).

Initially, South African courts applied the theory of absolute sovereign immunity. For example, in De Howorth versus The S-S India such immunity was upheld in respect of a merchant ship owned by the Portuguese government, because the vessel was found to have been used for a public purpose.

In the S-A case of Inter-Science Research and Development Services (Pty) Ltd versus Republica Popular de Moçambique the court concluded that the theory of restricted sovereign immunity was a general rule of international law (and applied it).

The Inter-Science decision was approved by the court in Kaffraria Property versus Government of the Republic of Zambia.

The position of sovereign immunity in S-A law was solidified by legislation (the Sovereign States and Immunities Act of 1981- F-S-I-A).

In terms of the provisions of F-S-I-A, a foreign state is not immune from the jurisdiction of municipal courts when the instituted proceedings relate to a "**commercial transaction**" into which the state has entered. "

Commercial transaction" is defined in section 4 of the Act as:

- any contract for the supply of services or goods;
- any loan or other transaction for the **provision of finance** and **any guarantee** or **indemnity** in respect of any such loan or other transaction or **of any other financial obligation;**
- and any other transaction or activity of a **commercial**, **industrial**, **financial**, **professional** or other **similar character** into which the foreign state enters or in which it engages otherwise than in the exercise of sovereign authority, but does **not include a contract of employment** between a foreign state and an individual.

As is evident from the wording of section 4(c) of F-S-I-A, the determining factor is recognised as the nature of the contract, rather than its purpose.

This was confirmed in the judgment of the court in Akademik Fyodorov: Government of the Russian Federation versus Marine Expeditions Inc, where it was held that section 4(3) of the F-S-I-A poses an objective criterion based on the nature or character of a particular transaction, contract or activity without reference to its purpose. However, even with this guideline in mind, there may still be actions related to the armed forces and diplomatic activities that will be hard to classify.

In the American case of Victory Transport Inc versus Comisaria General de

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Abastecinientos Y Transportes, where it was held that acts related to the armed forces, internal administrative acts, legislative acts, acts related to diplomatic activity, and public loans are to be regarded as acts in which a state engages in the exercise of sovereign authority - that is, acta jure imperii.

In the present scenario, we have a contract of purchase and sale in terms of which state A has bought army attire from a South African company. At first glance this is an act related to the armed forces, but it would also fall within the scope of section 4(c) of F-S-I-A because, as we pointed out above, it is the nature of the contract (a purchase and sale contract), and not its purpose (equipping State A's army) which is relevant in this context. However, Dugard highlights the fact that this view would "fail to have regard to the fact that courts are likely to be weary in asserting jurisdiction over any matter related to the armed forces". In the American case, Aerotrade versus Republic of Haiti,
the Republic of Haiti was successful in raising immunity against a claim for payment for military equipment supplied to it for use by its armed forces.

(The validity of the ultimate conclusion depended on the student's substantiation).

Question:

It is said that public international law has a dual function in the South African Constitution of 1996. Discuss this statement critically. Use sections 231 and 233 to highlight the difference in these two functions, and the practical effect which they may have on the application of public international law in South African municipal law. (15 marks.)

Answer:

International legal principles may be applied directly as law in South Africa, in order for a court to reach a decision on a case that has come before it.

Thus treaties, which have become part of South African law as provided for in section 231(4) (on which we will focus presently), or customary international law, which is part of South African law subject to the provisions of section 232 (which is not part of this question, but which we mention for the sake of clarity) will be applied directly by our courts.

International law may also be used to interpret provisions of our law, be it

- the Bill of Rights (section 39(1)), or
- our common law and customary law (section 39(2)), or
- legislation (section 39(2); section 233).

In this question, we will focus on the latter.

Section 231.

This section provides, among other things:

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(4) Any international agreement becomes law in the Republic when it is enacted as law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

This section sets out the process in which treaties would apply in South Africa.

Unless the provision of a treaty is self-executing, it will have to be transformed into municipal legislation. This can be done in the following number of ways:

(1) the provisions of the treaty are rewritten in an Act of parliament — see, for example, the Civil Aviation Offences Act 10 of 1972

(2) the treaty is enacted as a schedule attached to an Act of parliament — see, for example, the Diplomatic Immunities and Privileges Act 74 of 1989

(3) an Act of parliament may provide that a treaty will be incorporated by publication in the *Government Gazette* — see, for example, section 108 of the Income Tax Act.

What is important to understand is that whatever legislative shape the treaty takes, the end result of the process will be that its provisions can be applied directly by the South African courts.

Section 233: provides as follows:

When interpreting any legislation, every court **must** prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

One of the purposes of this section is **to promote harmony between international law and municipal law**. As a result of its provisions, international law finds indirect application within the domestic legal system.

This position is similar to the one we encountered under section 39. In other words, what is being applied directly is the actual legislative provision, but its meaning (the one which the court has found to be international law compliant) will have been determined by international law.

The latter will therefore permeate South African law not directly, but indirectly: the interpretative process will have inculcated the legislative provision with the relevant international law principle.

International law, in this context, includes customary international law that has been incorporated, as well as unincorporated treaties to which South Africa is a party. There is a presumption that in enacting legislation, legislature did not intend to violate South Africa's international obligations.

Lastly, some statutes may specify that international law should be used in their interpretation. For example, the Implementation of the Rome Statute of the
International Criminal Court Act 27 of 2002 provides that when a court applies the Act, it must consider international conventions and international custom.

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The Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 stipulates that those interpreting the statute may be mindful of international law. The Refugees Act 130 of 1998 stipulates that the Act is to be interpreted and applied with due regard to relevant conventions and the 1948 universal Declaration of Human Rights.

But even if such specific instructions are not included in the legislative text, the provisions of section 233 mandate the indirect application of international law in cases where an international element is present, and the court is required to interpret the provisions of a relevant statute.

2. FEEDBACK ON THE OCTOBER-NOVEMBER 2009 EXAMINATION.

SECTION A: ANSWER ALL THE QUESTIONS.

Question 1.

Write a paragraph explaining how the type of sanctions available for violation of national (domestic) laws within a state differs from the type of sanctions available at an international level against states which have violated international law. [10 marks.]

Answer:

Municipal (national law) judgments are backed by the complete executive machinery of the state in the form of a police force.

In international law, there is no central executive authority with a police force at its disposal to enforce judgments. At the international level, the Security Council (S-C) does have some "sanctions" that can be used: Chapter 7 of the United Nations Charter allows the S-C to direct its members, either individually or collectively, to use force against a state whose violation of international law constitutes a threat to international peace. The S-C can also use of economic sanctions against an offending state.

States can also resort to self-help. The different types of actions that can be taken include:

- reprisals;
- retortion;
- self-defence;
- embargo and boycott;
- sanctions;
- diplomatic action.

The enforcement mechanisms may seem to be violations of the nemo judex rule in circumstances when states do not enroll the help of an outside agency, such as the Security Council.

But even measures which involve outside agencies also have elements of self-help.

Remember, the fact that we mention these mechanisms in the context of a violation of the nemo judex in sua causa rule does not mean they are not permitted in international law. They will be valid if all the requirements have been met

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Question 4.

According to Dugard, wide jurisdictional powers are conferred on South African courts in respect of offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004. Name the grounds on which jurisdiction may be exercised by a South African court in terms of the provisions of this Act. [5 marks.]

ANSWER

- **Territory**
- Active personality (**nationality);**
- **Passive** personality;

- **Protection of the state**; and, - **Any other basis** recognised by law.

- **OCTOBER NOVEMBER 2000**
- **QUESTION 1**
- **List the differences between public international law AND MUNICIPAL LAW (5 Marks)**
  - **Answer**

Municipal law:

- **Full legislative** body;
- **The legislature enact rules of law which the citizens must obey;**
- **Full executive machinery for enforcement of judgments** and police force to enforce the law;
- **Fully developed judiciary**:

1. Precedent system applies;

and,

2. Nemo judex in sua causa;

Subjects are individuals.

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Public International law:

- **No legislative body** with the power to enact rules binding on all states;

- **Rules are to be found in agreements between states** (treaties) and in international custom;

- **No executive authority with a police force** at it's disposal to enforce the rules - poorly developed sanctions;

- **There is no court to enforce P-I-L:**
  1. No precedent system; and,
  2. State judge in own case;

- Subjects are generally states.

(b), Define ius cogens and explain the effect of this concept on the validity of a treaty. (10 marks.)

Answer:

Ius cogens is defined in the Vienna Treaty Convention as:

- an obligatory rule (of);

- general international law (which is);

- accepted and recognised by the community of states as a whole (as);

- a rule from which no deviation is allowed (and);

- which can be altered only by another norm or rule of the same kind.

States **cannot "contract out" of ius cogens** - it is absolutely binding on all states whether they like it or not. The only rule more of less generally accepted as ius cogens is the prohibition on the use of force. A treaty which conflicts with an existing norm of ius cogens is void from the outset. No treaty comes into existence. **However, if a treaty is already in existing and a new rule of ius cogens then develop, the treaty isn't void -performance which has already been rendered is perfectly valid, but there can be no further performance**.

(c), Briefly discuss the right of a foreign sovereign state to claim immunity before a South African court in a case arising from a commercial transaction into which it has entered. (10 marks.)

Answer:

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A foreign state will not be immune from the jurisdiction of a South African court in proceedings relating to 'commercial transactions' entered into by a state. However, states are immune as far as governmental public activities **(acta iure imperii**) are concerned.

The general rule in the Foreign States Immunities Act (F-D-I-A) is that one uses the nature of the act rather than it's purpose to determine whether or not it can be classified as imperii.

For example, if a foreign state concludes a contract with a S-A Company to supply army boots and then refuses to pay, will the foreign state be able to raise immunity in a subsequent action. If we apply the nature of the contract we will find that we are dealing with a normal contract of sale, which will not attract immunity, but if we apply the purpose of the contract, things will be different. In this case we have to ask what purpose the boots serve. Without boots the army cannot function, and the army is there for the defence of the state. The contract of sale would therefore be classified as a governmental act which will attract immunity.

The American Case Victory Transport Inc laid down certain acts which can be regarded as **imperii:**

- **internal administrative acts**;
- **legislative** acts;
- **acts related to the armed forces;** - acts related to **diplomatic activity**; and, - **public loans**.

The trend in Public International law is however, to restrict immunity where possible.

QUESTION 2.

Although there is no formal agreement on the use of water resources between South Africa and Lesotho, Lesotho has for 30 years allowed South Africa to draw water from a dam in Lesotho. After a democratic general election, a new government comes to power in Lesotho. This government immediately closes down the pumping station, cutting off the supply of water to South Africa. Dr Zuma, the South African Minister of Foreign Affairs, delivers a formal protest to her Lesotho counterpart. The Lesotho government acknowledges that it is legally bound to re-open the pumping station and does so immediately.One month later, however, the Lesotho government again closes the pumping station declaring that in the light of the unequal distribution of wealth in Southern Africa, it is no longer prepared to allow South Africa access to cheap water.South Africa claims that Lesotho's actions amount to a violation of a norm of public international law.Discuss fully, using the facts above and relating them to international case law, whether Lesotho has violated a norm of public international law and what body South Africa should approach to enforce it's claim. (20 marks.)

Answer:

For Lesotho to have violated a norm of public international law, **the violation must be based on either a treaty or custom**. In the above case there was no treaty between Lesotho and South Africa. We will therefore have to consider whether Lesotho violated a **custom of public international law**.

For a custom to arise **two requirements** must be met,

- usus and

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- opinio iuris.

In the Asylum case usus is defined as "constant and uniform usage". In terms of the North Sea Continental Shelf cases a state must feel that if it did not comply with the usage it would be committing an international "wrong", it would be breaching public international law. Following a rule simply because you feel that it is morally correct, is not sufficient. This case also states that universal acceptance is not necessary.

A practice which has continued for 30 years is surely "constant and uniform" enough to create a custom. Lesotho declared expressly that it was legally bound to re-open the pumping station, the legal obligation demanded by opinio iuris. So yes, there is a customary rule and by closing the station a second time, Lesotho is violating the rule and South Africa has a claim and should approach the International Court of Justice to settle the dispute.

The fact that only two states are involved is of no concern. The Passage over Indian Territory case confirms that regional customs are possible and that these can develop between two states.

QUESTION 4.

NOTE: This question does not require a discussion of the constitution. President Robert Mugabe of Zimbabwe issues a proclamation in terms of which certain white owned farms in Zimbabwe are confiscated by the government. The proclamation states clearly that no compensation will be paid to the registered owners of the farms.

Mr. B Uggers, a South African national who owns one of the farms mentioned in the proclamation approaches you and asks whether he has any recourse. Explain fully to Mr. Uggerd whether Zimbabwe has violated international law and if so, the basis of such violation and whether Zimbabwe is liable in terms of international law. Explain also, whether the South African government can or must act on his behalf Mr. Uggers is a South African national and not a Zimbabwean national, therefore international law is relevant. Nationalisation (Expropriation) is not prohibited by international law.

Answer:

Nationalization must meet certain requirements to be valid in terms of PIL

- **Must not be discriminatory**
- **Must be for public purposes**
- **Compensation must be paid**

As regard the first requirement, if Mr. Mugabe only expropriated property belonging to South African nationals it would be discriminatory. From the facts it is not certain what the purpose of the nationalisation was, if it was for the good of the country it will not be prohibited by international law.

What is however, certain, is that no compensation was paid and this is prohibited by international law.

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In terms of international law "appropriate" compensation must be paid. The United Nations Resolution 1803 requires appropriate compensation in accordance with municipal and international law, and United Nations Resolution 3281 requires appropriate compensation in terms of municipal law and taking into account all pertinent circumstances.

Before a state can act on the part of an individual who has suffered as a result of an international wrong in the territory of another state, the individual must be a national of the state. There is a difference of opinion whether the state can be compelled to act, Booysen, basing his opinion on China Navigation, suggests that there is no obligation on a state to protect it's national.

Dugard claims that China Navigation did not deal with the issue and therefore concludes that the question has not been settle in our law. It would therefore seem that Mr.Uggard would not be able to compel the S-A government to act on his behalf since the decision to protect the interests of a national abroad is an executive decision which cannot be questioned by the courts as it lies within the sole discretion of the national state, and political considerations will play a dominant role.

QUESTION 5.

"The use of international law by South African courts under section 39 and 233 of the R-S-A Constitution, is in some respects similar but also very different." Discuss this statement critically using the provisions of THESE TWO SECTIONS and assess the potential impact of these sections on South African law

The application of Public International law in South African law falls within two categories - direct and indirect application. When P-I-L is applied indirectly, the court are not applying P-I-L as such, what they are doing is testing South African law against P-I-L to determine the meaning of the provisions of our law. Therefore both sections 39 and 233 are applied as part of the interpretative process.

Answer:

Section 39 provides:

When interpreting the Bill of Rights, A court, tribunal or forum **must** promote the values of a democratic society and **must consider international law** and **may** consider foreign law.

Therefore, whenever a court has to decide a human rights matter, section 39 orders the court to consider P-I-L.. This section does not provide for the courts to apply P-I-L but only that they must have regard to it.

In contrast **section 233 provides when interpreting any legislation**: Every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Therefore, whenever a court has to decide whether an Act of Parliament is in conflict with P-I-L, section 233 provides that in interpreting any legislation, a court must prefer any interpretation which accords with international law over any interpretation which does not.

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EXAMINATION PAPER MAY-JUNE 2001.

QUESTION 1.

The United States of America arranges a conference between the Republic of South Africa and the Republic of Moçambique to discuss a possible compensation payment to Moçambique for losses suffered through the following:

- The involvement of the former S-A government in the Moçambiquan civil war; and,- The shooting down of the Moçambiquan President Machel's plane which resulted in his death.

South Africa, represented by the Minister of Education, and Moçambique, represented by it's President, sign an agreement brokered by the United States in terms of which S-A undertakes to pay the following amounts.

- 2 billion rand to Moçambique to be used for the rebuilding of it's infrastructure;- 5 billion rand to Moçambique to be used for the education of the children of victims of the civil war
- 2 billion rand to the widow of President Machel, who now lives in Johannesburg and isa South African citizen
- South Africa pays 7 billion rand to Moçambique in accordance with clauses (a) and (b) of the agreement.

However, after devastating floods the Moçambiquan government uses the 7 billion rand for infrastructure only and the South African government fails to pay the 2 billion rand due to Ms. Machel in terms of clause (c) of the agreement. Answer the following Questions

1. Define a treaty and discuss fully the characteristics identified in the Vienna Convention on the Law of Treaties for the creation of a valid treaty. (10 marks.)

Answer:

A treaty is

- an **agreement**,
- whether **written or oral**,
- **concluded between public international law subjects**
- with the intention of creating a public international law relationship.

The agreement must give rise to **reciprocal rights and duties** and must be governed by public international law.

Because a treaty is a consensual agreement, there **must be consent between the parties**. The parties must agree to create a P-I-L relationship.

The parties must be competent to conclude the treaty, certain people may bind the state because of the positions they hold (article 7(2) Vienna Convention), if a person falls outside this category, he or she must produce full powers.

The treaty must give rise to reciprocal rights and duties, and the rights and duties must be governed by public international law.

Question 2.

Apply the characteristics you have identified in 1 to the facts above to access whether a valid treaty has come into being. Explain fully who may bind the state on the international level and, in particular, the requirements set by the Vienna Convention in this regard. (12 marks.)

Answer:

Two states are concluding an agreement at a conference. The agreement is concluded between public international law subjects with the intention of creating a public international law relationship. The agreement contains reciprocal rights and duties. In terms Article 7(2) of the Vienna Convention certain persons are presumed to be competent to bind the state, these include:

(a) **Head of States,**
(b) **Head of Government**,
(c) **Minister of Foreign Affairs** and
(d) **Head of diplomatic mission** (ambassador or consul).

Moçambique is represented by it's President and therefore fall within the ambit of article 7(2) of the V-C, however, South Africa is represented by the Minister of Education. The minister would not have met the requirements of article 7(2) of the V-C and would have had to:

- **produce full powers** (ie documentary proof that he was authorised to perform the necessary function); or,

- if it is clear from the practice of the states or other considerations that the parties **intended the minister to represent South Africa**, full powers would not be necessary.

Question 3.

Explain whether Moçambique has breached the treaty by using the 7 billion rand compensation for infrastructure only. (8 marks.)

Answer:

The breach of the treaty must be material. The Vienna Convention V-C defines "material" as:

- A repudiation not allowed by the V-C; or,

- the violation of a provision essential for the achievement of the object or purpose of the treaty.

An essential provision of the treaty was that 5 billion had to be used for the education of the children of the victims of war. Moçambique breached this provision by using the money for infrastructure. The purpose for which the treaty was entered into was therefore not fulfilled. The treaty was a bilateral treaty and South Africa may therefore terminate or suspend the operation of the treaty in part or entirely.

Question 4.

Assuming that Moçambique has breached the treaty, in what forum (court) will S-A have to pursue the matter and are there any conditions which must be met before this forum can be approached. (5 marks.)

Answer:

South Africa will have to pursue the matter in the International Court of Justice.

Question 5.

Can Ms. Machel compel the S-A government to pay the 2 million rand due under 3 above in a South African court? Set out all the requirements provided in terms of the Republic of South African Constitution, for the conclusion of a treaty and it's enforcement by a S-A municipal court showing how they do or do not apply to the facts set out above. (15 marks.)

Answer:

In essence a state's municipal law determines who may conclude treaties on behalf of the state. Therefore, to determine who may conclude treaties on behalf of South Africa the first source of reference will be our Constitution.

Section 231(1) provides who may negotiate and sign treaties. In practice the President do not negotiate treaties and sign very few, this power is delegated to the Department of Foreign Affairs or a minister in charge of the topic covered by the treaty. The Minister of Education signed the treaty, the treaty will therefore not bind South Africa on the international plane, unless the minister produced full powers.

Section 231 (2) deals with the process by which a treaty becomes binding for South Africa on the international plane. The treaty must be approved by both houses of Parliament (National Assembly and the Council of Provinces).

Section 231(3) provides that technical, administrative or executive treaties and treaties which require neither ratification nor accession, will bind South African on the international plane without approval by Parliament, but it must be tabled in the National Assembly and the National Council of Provinces within a reasonable time.

Section 231(4) provides that all treaties become law and are enforceable by municipal courts only once they have been "enacted as law by national legislation". However, there is one exception, in the case of a self-executing treaty that has been approved by Parliament. A self executing treaty is defined by Shearer as - "a treaty which does not expressly or by it's nature require legislation to make it operative within the municipal field, and this can be determined by having regard to the intention of the signatory parties and to the surrounding circumstances". A self executing provision that has been approved by Parliament will therefore become law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

QUESTION 6

Write short notes on the following:

1.The role of the executive certificate in the recognition of states (7 marks)

Answer:

Only recognised states may appear as a party before South African Courts.

The act of recognition is a discretionary act by the executive in the exercise of it's prerogative to conduct foreign affairs.

When there is doubt whether or not a state is recognised, the court must determine the views of the executive by requesting a certificate from the Department of Foreign Affairs. When there is no doubt the court may take judicial notice of recognition.

However, in a few cases the courts overstepped this line. In Sperling versus Sperling the court recognised East Germany when the executive had not done so and in Parkin versus Government of the Republic of Congo the court recognised the Congolese government before the executive had done so.

Since the case of Harksen versus President of the R-S-A it is clear that the court have adopted a new approach to the executive certificate. In this case the court was faced with two certificate, one from Germany and one from South Africa.

Both certificates declared that there was no extradition treaty between the two states. The court did not just accept the position, but in fact examine the factual circumstances to establish for itself whether a treaty in fact existed

2. Compare the courts' approach to the question whether liability for police action may be imputed to the state in Nduli versus Minister of Justice and S versus Ebrahim. (8 marks.)

Answer:

In Nduli the court held that the South African state **cannot be held responsible for an arrest carried out by the South African police in Swaziland where such an arrest had been carried out contrary to the instructions of their superior officer**.

The court in Ebrahim had no difficulty in imputing responsibility to the state where a person was abducted from Swaziland by 'instruments' of the state, despite the absence of any evidence of official authorisation for their actions. **For a state to be liable, the actor must be a state organ, or an individual acting in his capacity as an employee of the state**. A state is generally responsible under international law for the unauthorised acts of it's agents. The decision in Nduli was therefore unsatisfactory.

3. List the bases on which a state may exercise jurisdiction in public international law. (5 marks.)

Answer:

- Jurisdiction over all **criminal acts that occur within it's territory** (territoriality);

- Jurisdiction where a **crime is commenced within it's territory** and **completed in another state**;

- Jurisdiction over **aliens who have committed acts abroad** that are considered prejudicial to it's safety and security;

- Jurisdiction over **own nationals wherever they act**;

- Jurisdiction over a **person who commits an offence abroad which harms one of it's own nationals**; and,

- Jurisdiction over a crime **committed abroad in violation of it's own national laws**. In the event of international crimes, crimes against humanity, any state may claim jurisdiction.

QUESTION 4.

Randy Smith, the son of the head of the accredited diplomatic mission from Hellsovania in SA, takes Ms Take, a twenty year old S-A student to an all night rave in ohannesburg. In the throes of ecstasy, Randy rapes Ms Take.

Ms Take lays a charge of rape against Randy with the S-A Police. May Sgt Pasop arrest Randy and search the embassy for evidence? Would your answer to these two questions differ if Randy were the son of the accredited consul from Savaland? Explain. (15 marks.)

Answer:

Diplomatic immunity is set out in the new S-A Diplomatic Immunities and Privileges Act, which incorporates the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations.

In brief, a diplomat may not be arrested or detained. The diplomat is absolutely immune from criminal jurisdiction. Regarding civil jurisdiction, he has immunity, unless the issue involves a real action for immovable property held in his personal capacity; the issue involves matters of succession in his private capacity; or he undertakes professional or commercial activities outside of official functions. The above given immunities extend to the diplomat's family.

Diplomatic premises may not be entered by the host state without the permission of the ambassador. The premises, furniture, cars, etc may not be searched, requisitioned, attached or sold in execution. Embassy archives, correspondence, postbags, etc may not be opened or searched.

Where Randy is the son of an accredited diplomat, Sgt Pasop cannot arrest Randy and charge him with rape. **Sgt Pasop cannot search the embassy for evidence and his hands are tied.** However, where Randy is the son of an accredited consul, the situation changes somewhat.

Consular immunity differs slightly from diplomatic immunity. The person of the consul (and his family and staff) may be arrested for "grave crimes". These crimes remain undefined, but in my opinion rape would constitute a "grave crime". The consul, family and staff are immune only as far as "acts performed in the exercise of consular functions are concerned".

The consular premises enjoy the same immunities as those of diplomat premises. So, if Randy is the son of a consul, he can be arrested for the grave crime of rape. However, the Sgt would still not be able to search the consular premises for evidence.

EXAMINATION PAPER MAY-JUNE 2002

Question.

In Abel versus Minister of Justice & Others, a case involving the South African-United States extradition treaty, the Cape High Court was required to interpret the provisions of article 4 of

the treaty. A literal interpretation of article 4 of the treaty based on South African municipal rules of interpretation would favour the applicant. On the other hand, a wider interpretation based on the provisions of the Vienna Convention on the Law of Treaties, would favour the respondent. You are appearing for the respondent (the Minister of Justice)

SA is not formally a party to the Vienna Convention on the Law of Treaties, although it has declared that it regards the treaty provisions as binding. Treaty interpretation is governed by articles 31 and 32 of the V-C.Can or must the court apply the provisions of the V-C in interpreting article 4 of the treaty and if so on the basis of what provisions in the R-S-A Constitution. (5)

Answer:

The courts may have regard to unincorporated treaties.

Section 233 holds the potential for the application of unincorporated treaties, albeit indirectly, this section provides when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Question.

Discuss fully, with reference to relevant S-A and international case law, the requirements which the court will have to consider in deciding whether it can make use of articles 31 and 32 of the V-C. (20 marks.)

3. Discuss fully the interpretation of treaties in terms of the V-C. (15 marks.)

Answer:

Treaty interpretation is governed by articles 31, 32 and 33 of the Vienna Convention.

There are broadly three approaches to treaty interpretation:

- **The literal or textual approach** - concentrates on the actual text of the treaty and reflects a positivist approach. This approach was used in the South West Africa, Second Phase Case.

- **The Purposive approach** - interprets the treaty to give effect to the purpose for which it was concluded. This approach was followed in South West Africa cases Article 31 of the V-C recognizes both the textual and teleological approaches by providing that treaties shall be interpreted in good faith in accordance with the ordinary meaning of the words used in context, bearing in mind the object and purpose of the treaty. These are the primary means of interpretation.

- **The intention of the parties approach** receives support from article 32, which permits recourse to 'supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of it's conclusion'. Like municipal law, international law knows no hierarchy of rules of interpretation. Instead judges are allowed to select the approach which he considers most appropriate in the circumstances of the case.

Section 231(1) of the Republic of S-A Constitution reads:

"The negotiation and signing of all international agreements, is the responsibility of the national executive".

Although the Constitution does not define an "international agreement" this matter was settled in Harksen versus President of the R-S-A and finally in Jurgen Harksen versus President of the R-S-A.

1. In the light of the above cases, define what is meant by an international agreement for purposes of the S-A municipal law. (8 marks.)

Answer:

In Harksen it was claimed that the term "international agreement" was wider than the term "treaty" and includes informal agreements between states.

Although the Cape Provincial Division held that the term "international agreement" could include informal agreements, this was rejected by the Constitutional Court in Harksen 3. Therefore in terms of the Constitutional Court, "international agreement" is to be understood to mean "treaty" as defined in section 2(1) of the Vienna Convention on the Law of Treaties.

In Harksen versus President of the R-S-A the court stated "**what is important is that the agreement be between states, in writing and that the state parties intend it to be governed by international law**". In Harksen the court held that an arrangement to extradite a person under the Extradition Act, did not qualify as an international agreement, because of the absence of an intent on the part of S-A and Germany to create reciprocal rights and duties

QUESTION
What is required before a treaty referred to in section 231 (1) will bind the Republic the international plane (2 Marks)

Answer:

The negotiation and signing of a treaty by the national executive will bind the Republic on the international plane. In practice the President does not negotiate treaties and sign very few, this power is delegated to the Department of Foreign Affairs or linefunction ministers in charge of the topic covered by the treaty.

QUESTION

Are there any exceptions to this rule and if so list them (4 Marks)

Answer:

Yes there are. Section 231(2) provides that treaties of a
technical, executive nature or **administrative** or
an agreement which does not require either **ratification or accession**,

entered into by the national executive, binds the Republic, without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

Question.

Explain any further steps which must be taken before a treaty will bind the Republic on the municipal plane. (4 marks.)

Answer:

Section 231(4) provides that all treaties become law and are enforceable by municipal courts only once they have been "**enacted as law by national legislation**".

QUESTION

Are there any exceptions to this general rule (2 marks)

Answer:

Yes. In terms of section 231 (4) a self executing provision that has been approved by Parliament will become law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Question.

Discuss fully, with reference to case law and relevant legislation, the so-called "commercial transaction" exception to the right of a foreign sovereign state to claim immunity before a South African court. (12 marks.)

Answer:

What is a commercial transaction?

The Act provides that a "commercial transaction" is:

- Any **contract for the supply of services or goods**;

- Any **loan or other transaction** for the **provision of finance** and any guarantee **or indemnity** in respect of such **loan or other transaction**;

- Any other transaction or activity of a **commercial, industrial, financial, professional** or **similar nature** into which the foreign state enter, otherwise than in the exercise of sovereign authority.

But does not include a contract of employment between a foreign state and an individual.

A foreign state will not be immune from the jurisdiction of a South African court in proceedings relating to 'commercial transactions' entered into by a state. However, states are immune as far as governmental public activities (acta iure imperii) are concerned. The general rule in the Foreign States Immunities Act (F-D-I-A) is that one uses the nature of the act rather than it's purpose to determine whether or not it can be classified **as imperii.**

For example, if a foreign state concludes a contract with a S-A Company to supply army boots and then refuses to pay, will the foreign state be able to raise immunity in a subsequent action. If we apply the nature of the contract we will find that we are dealing with a normal contract of sale, which will not attract immunity, but if we apply the purpose of the contract, things will be different. In this case we have to ask what purpose the boots serve. Without boots the army cannot function, and the army is there for the defence of the state. The contract of sale would therefore be classified as a governmental act which will attract immunity.

The American Case Victory Transport Inc laid down certain acts which can be regarded as imperii:

- internal administrative acts;
- legislative acts;
- acts related to the armed forces;- acts related to diplomatic activity; and, - public loans.

The trend in Public International law is however, to restrict immunity where possible.

Question.

Contrast the weight which should be attached by a S-A court to the decisions of the German Constitutional Court and those of the European Court of Human Rights in determining the content of a right embodied in Chapter 2 of the S-A Constitution. (8 marks.)

Answer:

Section 39 of the Constitution governs the interpretation of rights embodied in Chapter 2 (Bill of Rights) and provides as follows:

1. When interpreting the Bill of Rights:

- a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

- **must** consider **international law;** - **may** consider **foreign law.**

The Constitution provides that we must consider international law, it is not merely a request, it is a "command". We must therefore consider the European Court of Human Rights' decision.

Section 39 further provides that a court may consider foreign law. It may therefore look at the decision of the German Constitutional Court. The weight of the decision of the European Court of Human Rights therefore carries more weight than the decision of the German Constitutional Court.

On 11 September 2001, Islamic Extremists flew two passenger aircraft into the World Trade Centre in New York, United States of America, destroying the heart of Manhattan and killing thousands of innocent civilian Americans. The United States retaliated by declaring "war" on terrorism and bombing Afghanistan where the leadership of the Islamic Group were living. Assess the appropriateness of the American response in terms of the requirements set by international law for the following enforcement measures:

1. Reprisals. (5 marks.)

Answer:

Reprisal action requires a

- **prior unlawful act** against the claimant state
- **by the target state** ,
- a **failed attempt to secure redress by other means**, and - a **proportionate response .**

The Islamic Extremists acted unlawfully, the United States retaliated by bombing Afghanistan without attempting to first find a peaceful solution. The 1970 Declaration on Principles of International Law declares that "states have a duty to refrain from acts of reprisal involving the use of force". Whether the response was proportionate is debatable. In my opinion the United States acted unlawfully.

2. Self-defence. (15 marks.)

Answer:

Articles 2(3) and (4) of the Charter provide that states must settle their disputes peacefully, it further provide for a general prohibition on the use of force.

Article 51 allows for individual or collective self-defence.

This action isallowed **only against an armed attack** and **must be reported to the Security Council** and shall not in any way affect the authority and responsibility of the Security Council to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

The purpose of the attack must be to defend yourself, and must **not contain some hidden agenda**. The measures used must be in proportion to the threat posed.

The United States was unaware that the attack was going to take place. The question is then - must you wait until you are actually attacked before you actor, if you see the attack is imminent, can you defend yourself before you are actually harmed. This action is known as a pre-emptive strike or anticipatory self-defence.

In my opinion the United States acted in self-defence. Whether the response attack on Afghanistan was proportionate is debatable. One could argue that it was, but the attack on the United States was carried out by a handful of Islamic extremists, and I am sure that it could have been resolved peacefully.

Question.

Discuss fully how recognition of a foreign state or government is proved in a S-A court. In your answer refer to relevant case law and indicate any recent developments in this regard. (20 marks.)

Answer:

The act of recognition is a **discretionary act by the executive in the exercise of it's prerogative to conduct foreign affairs**. The role of the courts are therefore limited to determining the **will of the executive and applying it**. The classic formulation of this rule is by Lord Atkin in Government of the Republic of Spain versus SS Arantzazu Mendi

"**our state cannot speak with two voices ...the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognise as a fellow sovereign**.

To avoid this problem arising, where there is "any doubt" about whether or not a state or government is recognised, the court must determine the views of the executive by **requesting a certificate from the Department of Foreign Affairs** (Inter-Science Research versus Republica de Moçambique).

Where there is no "doubt" the court may take judicial notice of recognition.
"No doubt" should here be equated with "common knowledge", and judicial cognisance should be taken only when dealing with states such as the **USA, UK, France etc**. S-A court have on a number of occasions overstepped this mark.

In Parkin versus the Republique of the Congo the Congolese government was recognised by the court before the executive had done so.

In Sperling versus Sperling even the Appellate Division recognised East Germany when the executive had not done so.

In all these cases the correct procedure would have been for the court to request an executive certificate. **This certificate is then decisive and is binding on the court**. The question arises whether the courts have any role to pay in this regard, the answer is yes.

Firstly, the court is the body which must interpret the certificate, should the certificate be ambiguous the court must "reconcile the interests of the executive with common sense and justice (Republic Somalia versus Woodhouse Drake & Cary).

Secondly, the court will not be bound by a certificate which has been issued mala fide or with the intention of influencing the outcome of a particular case.

Since the case of Harksen versus President of the R-S-A it is clear that the courts have adopted a new approach to the executive certificate. In this case the court was presented with two certificates, one from Germany and one from South Africa. Both certificates declared that no extradition treaty existed between the two states. However, the court examined the factual circumstances in great detail to establish for itself whether a treaty in fact existed, the court held "what is important is that the agreement be between
states, in writing and that the state parties intend it to be governed by international law".

EXAMINATION PAPER OCTOBER-NOVEMBER 2003.

QUESTION 1

On a recent trip to New York the South African Minister of Foreign Affairs enters into an agreement with her counterparts from the Democratic Republic of Congo (DRC), Botswana, Uganda and Angola on the treatment of illegal immigrants without producing full powers. At the same time the South African Minister of Health is visiting Zimbabwe were she enters into an environment protection agreement without producing full powers with Zimbabwe's Minister of Environmental Affairs.

(a) Discuss fully with reference to both the Vienna Convention on the Law of Treaties and the South African Constitution whether:

(i), the treaty on environmental protection will bind S-A on the international plane. (7 marks.

Answer:

Article 7(2) of the Vienna Convention provides for certain people who can bind the state ex officio (as a result of the position they hold). These include:

- Heads of state;
- Heads of government;
- Minister of Foreign Affairs;- Head of Diplomatic mission.

The S-A Minister of Health does not meet the requirements of art 7(2) and would therefore have to produce full powers that he or she is authorised to perform the necessary function or alternatively, article 7(1)(b) provides that if it is clear from the practice of the states or from other considerations that the parties intended the person to represent the state, full powers are not necessary.

Section 231 (1) of the Constitution provides who may negotiate and sign treaties (it is the responsibility of the national executive) and section 231(2) deals with the process by which a treaty becomes binding for S-A on the international plane. It must be approved by resolution in both the National Assembly and the National Council of Provinces.

(ii), whether the treaty on the treatment of illegal immigrants will bind South Africa on the international plane. (8 marks.)

Answer:

The S-A Minister of Foreign Affairs satisfy the requirements of article 7(2) of the Vienna Convention and need not produce full powers.

In terms of section 231(1) of the Constitution it is the responsibility of the national executive to negotiate and sign treaties.

In practice the President does not negotiate treaties and signs very few, this power is delegated to the Department of Foreign Affairs, or line-function minister in charge of the topic covered by the treaty. In terms of section 231 (2) the treaty must be approved by resolution in both the National Assembly and the National Council of Provinces.

However, section 231 (3) provide that an International Agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession,

entered into by the national executive (Minister of Foreign Affairs), binds the Republic without approval by the National Assembly and the National Council of Provinces, but it must be tabled in the Assembly and the Council within a reasonable time.

The Minister of Foreign Affairs therefore had full power to bind the Republic, and S-A will be bound on the international plane.

Question:

(b), Assume that the treaty on the illegal immigrants is binding on S-A at an international level. Mr. Musina, an illegal immigrant from Mozambique approaches a SA court claiming damages on the grounds that the treatment he received at the hands of the S-A Police Services was in violation of his rights under the treaty. Write a legal opinion for the Minister of Safety and Security in which you set out the status of the treaty in S-A law. In setting out your legal opinion, you must include a discussion of the different ways that Mr. Musina can use the treaty to substantiate his claim. (20 marks.)

Answer:

The fact that the treaty is binding internationally does not make it effective in, or applicable to, municipal law. Nor does it mean that it can be applied by S-A courts.

Section 231(4) provides that all treaties become law and are enforceable by municipal courts only once they have been "enacted as law by national legislation". However, there is one exception, in the case of a self-executing treaty that has been approved by Parliament.

A self executing treaty is defined by Shearer as - "**a treaty which does not expressly or by it's nature require legislation to make it operative within the municipal field, and this can be determined by having regard to the intention of the signatory parties and to the surrounding circumstances**".

A self executing provision that has been approved by Parliament will therefore become law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

The question does not say that the treaty was "enacted as law by national legislation", it therefore does not have municipal effect. However, this does not mean that the treaty is of no use to Mr. Musina. Mr. Musina can use the unincorporated treaty in a variety of ways.

Section 232 provides that customary international law is law in the Republic, unless it is inconsistent with the Constitution or with an Act of Parliament. Evidence of state practice can be found in a variety of materials, including treaties.

Mr. Musina can use the treaty indirectly in terms of section 39 of the Constitution. Firstly it will have to be established whether the rights complained of appears in Chapter 2 of the Constitution.

Section 39 of the Constitution provides that when interpreting a Chapter 2 right:

- **a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;**

- **must** consider **international law;**

- **may** consider **foreign law.**

Section 233 provides that when a court interprets legislations it must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

It must be noted that when the courts apply a treaty indirectly, it is not the treaty that is being applied, but rather another source of municipal law (international law).

Question.

(c), On ratification of the treaty relating to illegal immigrants, the DRC registers a reservation to article 24 of the treaty (which deals with treatment of illegal immigrants by police). The state of Mozambique accepts the reservation. S-A on the other hand rejects the reservation. Angola, Botswana and Uganda do not respond to the reservation. Discuss fully the legal consequences of the reservation on the operation of the treaty between the various states. (15 marks.)

Answer:

A reservation is an offer by the reserving state to the other parties to a multilateral treaty, proposing that the agreement between them will have a certain content.

Article 19 of the Vienna Convention on the Law of Treaties provides that a state may accept a treaty subject to reservations unless:

- the treaty **forbids reservations**;

- the treaty **allows only certain reservations** (and the proposed isn't one of them);

- the reservation **proposed is contrary to the object and purpose of the treaty.**

The general rule therefore is that all treaties can be accepted subject to reservations.

Treaties are consensual and a proposed reservation is an offer.

The other parties to the treaty can therefor either accept or reject the reservation. Failure to object to a reservation is taken to mean tacit consent to the reservation.

Moçambique accepted the reservation, Angolo, Botswana and Uganda did not respond to the reservation (this means they tacitly accepted the reservation).

In this case the entire treaty applies between the parties BUT, the provision in the original treaty to which the reservation has been entered will be replaced by the provision in the reservation.

South Africa rejects the reservation. **This must be done expressly**. If a state rejects a reservation, the reservation does not come into operation between the reserving and the rejecting state, because their is no consensus BUT the clause to which a reservation is entered also cannot apply, again there is no consensus.

This clause is then removed from the treaty between these two parties. The rest of the treaty applies between these parties. If a vacuum arises from the cancellation of the clause, customary international law will apply to that aspect.

REMEMBER. Treaty obligations between all non-reserving parties remain unaffected by the reservation.

QUESTION 2.

Discuss fully, with reference to case law and relevant legislation, the so called "commercial transactions", exception to the right of a foreign sovereign state to claim immunity before a S-A municipal court. (15 marks.)

Answer:

Section 4 of the Foreign States Immunities Act provides that a commercial transaction is:

- **any contract for the supply of services or goods**;

- **any loan or other transaction for the provision of finance** and any **guarantee or indemnity** in respect of any such loan or other transaction or of **any other financial obligation;**

- **any other transaction or activity of a commercial**, **industria**l, f**inancial**, **professiona**l or **other similar character** into which the foreign state enters or in which it engages otherwise than in the exercise of sovereign authority.

But does not include a contract of employment between a foreign state and an individual.

States remain immune as far as governmental public activities (acta jure imperii) are concerned, but are not immune when they perform commercial activities.

The American case Victory Transport Inc laid down certain acts which can be regarded as imperii:

- internal **administrative acts;**
- **legislative acts**;
- acts related to the **armed forces;** - acts related to **diplomatic activity;** - **public loans.**

QUESTION 3.

With reference to recent international and municipal case law and legal developments (resolutions) discuss critically the extent to which international law developments regarding head of state immunity are reflected in the S-A Diplomatic Privileges and Immunities Act (15)

Answer:

Section 4 of the Diplomatic Immunities and Privileges Act provides that a head of state is immune from the criminal and civil jurisdiction of the court of the Republic, and enjoys such privileges as heads of state enjoy in accordance with the rules of customary international law are provided for in any agreement entered into with a state or government whereby immunities and privileges are conferred upon such a head of state may be conferred on such a head of state by virtue of section 7(2).

In the Pinochet case the House of Lords found that a serving head of state was entitled to absolute immunity, but that a former head of state (as in Pinochet's case) was entitled to immunity only for acts performed in the "exercise of his functions as head of state, and because the acts complained of, in this case mass torture and human rights violations, did not fall within the office of a head of state, he no longer enjoyed immunity.

In the Ghaddafi case a complaint was filed that the Libyan government was involved in the bombing of a U-T-A aircraft which caused the death of 156 passengers and 15 crew members. The court in this instance accepted a plea of immunity and declined jurisdiction.

There is a growing international pressure for heads of state to be liable for their actions. The immunities from Jurisdiction and Execution of Heads of State and Heads of Government in International law is interesting. At the moment the provisions of the resolution comprise a source of non- soft law.

n this resolution immunities are restricted to the minimum. The head of state remains subject to private law that protects creditors and other individuals. It also states that the head of state has no immunity regarding the misappropriation of his own state's assets.
The main provisions of the resolution are the following:

- **For the period in which they are in office**, heads of state enjoy personal inviolability and absolute immunity from criminal jurisdiction;

- **A former head of state enjoys inviolability or immunity solely in respect of acts which are performed in the exercise of official functions**;

- It is expressly stated that he **may be prosecuted for acts constituting a crime under international law**; or,

- **misappropriation of the state's assets or resources**.

If these requirements meet the requirements for customary international law (usus and opinio juris) then S-A, in accordance with the DIPA, will also consider the head of state liable in certain circumstance.

QUESTION 4

Discuss fully how the recognition of a foreign state or government is proved in a S-A court. In your answer refer to relevant case law and indicate any recent developments in this regard. (15 marks.)

Answer:

The act of recognition is a **discretionary act by the executive in the exercise of it's prerogative to conduct foreign affairs**. The role of the courts are therefore limited to determining the **will of the executive and applying it**. The classic formulation of this rule is by Lord Atkin in Government of the Republic of Spain versus SS Arantzazu Mendi

"**our state cannot speak with two voices ...the judiciary saying one thing, the executive another. Our sovereign has to decide whom he will recognise as a fellow sovereign**.

To avoid this problem arising, where there is "any doubt" about whether or not a state or government is recognised, the court must determine the views of the executive by **requesting a certificate from the Department of Foreign Affairs** (Inter-Science Research versus Republica de Moçambique).

Where there is no "doubt" the court may take judicial notice of recognition.
"No doubt" should here be equated with "common knowledge", and judicial cognisance should be taken only when dealing with states such as the **USA, UK, France etc**. S-A court have on a number of occasions overstepped this mark.

In Parkin versus the Republique of the Congo the Congolese government was recognised by the court before the executive had done so.

In Sperling versus Sperling even the Appellate Division recognised East Germany when the executive had not done so.

In all these cases the correct procedure would have been for the court to request an executive certificate. **This certificate is then decisive and is binding on the court**. The question arises whether the courts have any role to pay in this regard, the answer is yes.

Firstly, the court is the body which must interpret the certificate, should the certificate be ambiguous the court must "reconcile the interests of the executive with common sense and justice (Republic Somalia versus Woodhouse Drake & Cary).

Secondly, the court will not be bound by a certificate which has been issued mala fide or with the intention of influencing the outcome of a particular case.

Since the case of Harksen versus President of the R-S-A it is clear that the courts have adopted a new approach to the executive certificate. In this case the court was presented with two certificates, one from Germany and one from South Africa. Both certificates declared that no extradition treaty existed between the two states. However, the court examined the factual circumstances in great detail to establish for itself whether a treaty in fact existed, the court held "what is important is that the agreement be between
states, in writing and that the state parties intend it to be governed by international law".

QUESTION 5.

The treaty establishing the International Criminal Court (Rome Statute) came into force in July 2002. List the situations in which this court may exercise it's jurisdiction. (5 marks.)

Answer:

- **At least one of the parties involved is a state party;**
- **The accused is a national of a state party**;
- **The crime is committed in the territory of a state party;**
- **A state, not party to the Statute, may decide to accept the court's jurisdiction over a specific crime that was committed within its territory, or that was committed by its national;**
- **The United Nations Security Council, acting under Chapter 7 of the Charter, refers a situation to the prosecutor.**

- **MAY JUNE 2004**

- **QUESTION**

- **Differentiate between impossibility of performance and Rebus sic stantibus (10 marks)**

- **Answer**

Impossibility of performance.

A material breach of a treaty, ie. the violation of a term essential to the accomplishment of the purpose of the treaty or a repudiation not sanctioned by the Vienna Convention, entitles the other party to invoke the breach as a ground for terminating the treaty. In terms of Article 61 of the Vienna Convention a state may invoke a ground of impossibility of performance if:

- **The object indispensable for the performance is permanently destroyed**; and,

- **it isn't the fault of the party raising the impossibility**.

Customary international law recognizes the right of a state to terminate a treaty where there has been a fundamental change in the circumstances which formed part of the treaty. Article 62 of the Vienna Convention regulates change of circumstances. This section provides:

- **The fundamental circumstances are those which existed when the treaty was concluded**;

- **A change in circumstances must have occurred**;

- **The change must not have been foreseen by the parties at the time the treaty was concluded**.

As a general rule a change of circumstances does not give a state a right to terminate the treaty, however, there are exceptions

a), if the existence of the circumstances was an **essential basis** for the **conclusion** of the treaty; and,

b), if the change **radically effects the obligations** under the treaty the change may give rise to a right to terminate the treaty,

It must be noted that **rebus sic stantibus may not be raised in treaties** establishing boundaries or by the party responsible for the change.

Question.

Briefly explain the three most important ways in which a state can express consent to be bound by a treaty. (5 marks.)

Answer:

Certain people are presumed to bind a state because of the positions they hold (ex officio), they are:

- Head of **State;**
-Head of **Government;**
- **M**inister of **F**oreign **a**ffairs;
- **Head of diplomatic mission**;
- **State representatives** at treaty making conferences.

Although in principle treaties come into operation on signature, this is not always the case. Most treaties have the additional requirement of ratification. Ratification means that after the treaty has been signed, the state has a 'second change' to confirm (ratify) it's intention to be bound.

A state can accent to a treaty. This means that a state which was not a party to a original treaty may become a party. This it does by depositing a notice of accession. The original treaty must allow for accession and the parties to the original treaty must agree to the 'new' state joining the treaty.

X is a member of an extremist right wing group wanted in S-A to face charges of terrorism. Feeling that his arrest is imminent he flees to Swaziland where he settles. The Swazi authorities are aware of his presence in the country and allow him to remain on a temporary residence permit. There is a valid extradition treaty between SA and Swaziland.

The S-A police officer in charge of the case approaches his Swazi counterpart and asks if he can enter the country to capture X.. The Swazi official refuses, saying that the correct procedure under the extradition treaty should be followed. The S-A officer conveys this news to his men and tells them that they may not seize X in Swaziland.

Despite these instructions, A and B, two constables enters Swaziland one night in their police vehicle and in uniform, grab X and bring him back to S-A where he is arrested and charged.

EXAMINATION PAPER OCTOBER-NOVEMBER 2004.

QUESTION 1

Discuss the element usus as a requirement for customary international law (10 Marks)

Answer:

While states give their express consent to be bound by a rule when they enter into a treaty, consent of states to a customary rule is inferred from their conduct. There must be a general practice among states for custom to develop. This requirement is defined in the Asylum case as "constant and uniform usage".

In order to establish whether a usage has developed it is necessary to look at a number of elements, for instance:

- **Repetition**:

Here we will have to consider the nature of the rule involved. If the rule effects most states, a greater number of repetitions will be required. If the rule effects only a few states, fewer repetitions will be required.

- **Time:**

Here again the nature of the rule must be considered. By nature, custom is a

slow process but it could also develop quickly.

- **The number of states involved:**

A custom can develop between only a few states. Although the court in Nduli versus Minister of Justice suggested "universal acceptance", subsequent South African decisions indicated that "general acceptance" is sufficient. In S versus Petane the court held that if a state persistently objects to a particular practice while the law is still in the process of development, it cannot be bound by any customary rule that may emerge from such a practice. However, in the bad old days South Africa persistently objected to
treating apartheid as a violation of customary law. But the prohibition of apartheid is a peremptory norm (ius cogens) and no state can contract out of ius cogens.

How do we know if a usage exist, the answer is simple, anywhere that reflects the practice of the state, this can be found in newspapers, court decisions, opinion of law advisers etc.

QUESTION 2

Write a short note on judicial decisions and international writers as a source fo international law(5 marks)

Answer:

Article 59 of the International Court of Justice (I-C-J) is used to justify the absence of a precedent system in P-I-L, it provides as follows "**the decision of the court has no binding force except between the parties and in respect of that particular case**". It would seem that only international decisions and most notably those of the IC-J must be followed in a current case. However, if an important point had been thoroughly examined in a municipal court, the court could possibly also refer to it.

The court is also authorised to use the works of international writers, but how do you determine which writer is "most highly qualified**". In Nduli versus Minister of Justice** the court referred to only one international authority, a person called Francois. It later transpired that Francois wrote the textbook which the judge has used at university.

It is important to remember that the use of "publicists and judicial decisions" is a subsidiary means for the determination of rules of law. These sources are not in themselves capable of creating international rules, although they can be used, and they are not hierarchical.

QUESTION 2.

The Convention on the Elimination of All Forms of Discrimination Against Women, which entered into force in 1981, obliges states to ensure that their legal systems guarantee equal right to women. When Libya acceded to the Convention it entered a reservation that reads as follows:

"The accession is subject to the general reservation that such accession cannot conflict with the laws on personal status derived from the Islamic Sharia".

1. Discuss the compatibility of this reservation with the Vienna Convention on the Law of Treaties. (4 marks.)

Answer:

The answer to the above lies in article 19 of the V-C. This article provides that a state may accept a treaty subject to reservations unless:

- the treaty forbids reservations;
- the treaty allows only certain reservations (and the one proposed isn't one ofthem);
- the reservation proposed is contrary to the object and purpose of the treaty.

It is clear from the facts that the object and purpose of the treaty is to eliminate all forms of discrimination against women. **Libya's reservation is subject to the fact that the treaty cannot conflict with it's law on the personal status of women as derived from the Islamic Sharia**. The treaty is not compatible with the Vienna Convention, the other parties to the treaty can therefore not accept Libya's reservation.

2. How will the reservation affect the relationship between:

a), the reserving state and states that accept the reservation. (2 marks.)

Answer:

The entire treaty applies between the parties, BUT, the clause in the treaty to which the reservation has been entered will be replaced by the clause in the reservation.

b), the reserving state and the states that reject the reservation. (6 marks.)

Answer:

Rejection of a reservation must be express. If a state rejects a reservation, the reservation does not come into operation between the parties (there is no consensus) BUT, the clause to which the reservation is entered can also not apply, again there is no consensus, and it is removed from the treaty for those parties.

If a vacuum arises from the cancellation of that clause, customary international law will apply to that aspect.

The rest of the treaty applies between the parties. If the state rejects the reservation and the treaty coming into operation, the treaty will not operate between the parties.

c), the accepting and rejecting states. (2 marks.)

Answer:

The relationship between the accepting and the rejecting states will be unaltered, the treaty will apply normally between the parties.

QUESTION 3.

Treaties have to be incorporated in South African law to have any effect on municipal law. Critically evaluate this statement with reference to the 1996 Constitution and any supporting case law. (20 marks.)

Answer:

Although only incorporated treaties can be enforced in municipal law, the courts may have regard to unincorporated treaties. In S versus Werner the court stated that the UN Charter, (an unincorporated treaty) could be used to clear up an ambiguity in the Group Areas Act, although it wasn't applied.

Section 232 provides that customary law is law in South Africa. Customary international law is often embodied in treaties. In S versus Petane the court considered whether the Geneva Protocol of 1977 (unincorporated treaties) had become part of customary international law. It must however be remembered that the court does not apply the unincorporated treaty, it applies the customary rule which the treaty embodies.

Under section 39 of the Constitution, the courts must be considered international law when interpreting the Bill of Rights, and this would include unincorporated treaties.

Section 231 (4) provides that self-executing provisions will be law in the Republic without the need for national legislation, provided that it is not inconsistent with the Constitution or an Act of Parliament.

Lastly section 233 holds the potential for the application of unincorporated treaties. This section provides that the courts, when interpreting legislation, must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

QUESTION

Discuss how international agreements became law in South African under the interim 1993 Constitution (5 marks)

Answer:

Under the 1993 Constitution Parliament (National Assembly and Council of Provinces) shall agree to the "ratification of or accession to" treaties. This however, does not give the treaty municipal application. In terms of section 231 (3) of the Interim
Constitution, municipal or Constitutional (step that makes the treaty available to a S-A court) ratification occurs when Parliament "expressly so provides", but what does this mean. Internationalists differ on this point.

One group (including Dugard) felt that a mere declaration by Parliament is sufficient, while another group (Devine) claimed that parliamentary legislation is still required.

Under the Interim Constitution the incorporation of treaties into South African law was a fairly simple process, it was published in the Government Gazette, statutory incorporation was not required.

QUESTION 4.

Section 25 of the 1996 Constitution reads in part:

No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property
b) Property may be expropriated only in terms of a law of general application for a public purpose or in the public interest; and subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances, including:

- **the current use of the property;**
- **the history of the acquisition and use of the property;**
- **the market value of the property;**
- **the extent of direct state investment and subsidy in the acquisition andbeneficial capital improvement of the property; and, - the purpose of the expropriation.**

Question.

Assess, using section 39 of the Constitution, whether section 25 reflects the international law requirements set for the nationalisation of property belonging to foreigners. (15 marks.)

Answer:

Nationalisation of land is not prohibited by international law. There are, however, certain basic requirements for a nationalisation to be valid in terms of Public International Law, these are:

- The nationalisation must not be discriminatory;- The nationalisation must be for public purposes; - Compensation must be paid.

Section 39 provides that a court must consider international law and we therefore have to consult international law regarding the payment of compensation. In this regard we will turn to the United National Resolution 1803 which requires appropriate compensation in accordance

with municipal and international law, and the United National Resolution 3281 which requires appropriate compensation in terms of the municipal law and taking into account all pertinent circumstances.

Section 25 of the Constitution incorporates public purpose, public interest and compensation in it's requirements for expropriation. The expropriation must also be in terms of general application which takes care of the non-discrimination requirements of international law.

Section 25(3) prescribes a number of factors which have to be considered in calculating the amount of compensation. Compared to the "benefits theory" these factors show great similarity to the way Resolution 3281 is interpreted.

Section 25 therefore reflects the international law requirements set for the nationalisation of property belonging to foreigners.

QUESTION 5.

1. List the principles, as set out in the Lotus case which form the basis of jurisdiction in public international law and explain how the problem inherent in these principles is corrected. (6 marks.)

Answer:

3 principles form the basis of jurisdiction in international law:

1. **State cant exercise its jurisdiction in the territory of another state unless there is a rule allowing for this**

2. **State must exercise jurisdiction in its own territory over acts occurring elsewhere, unless there is an international law forbidding this**

3. **In international law the territoriality of a criminal case isn't absolute-**

The court in this case allowed a virtually unlimited extension of a state's jurisdiction. A solution to this problem was found in the concept that states could extend their jurisdiction, provided there was a direct and substantial connection between the state concerned and the events involved in the dispute.

2.Discuss the bases of jurisdiction in public international law (15 Marks)

Answer:

The exercise of jurisdiction is a "direct and substantial connection" between the state concerned and the events involved in the dispute. The international community therefore has developed certain, more specific, criteria in terms of which the exercise of jurisdiction by a state would be acceptable, these are:

- Jurisdiction over all criminal acts that occur within it's territory (territoriality);

- Jurisdiction where a crime is commenced within it's territory and completedin another state;

- Jurisdiction over aliens who have committed acts abroad that are consideredprejudicial to it's safety and security;

- Jurisdiction over own nationals wherever they act;

- Jurisdiction over a person who commits an offence abroad which harmsone of it's own nationals;

- Jurisdiction over a crime committed abroad in violation of it's own nationallaws. In the event of international crimes, crimes against humanity, any state may claim jurisdiction.

- **QUESTION**

- **Discuss the provisions of the Foreign States Immunities Act with reference to waiver and commercial transactions (14 marks)**

Answer:

A state will not be allowed to raise immunity before a South African court in a number of cases.

Waiver:

- A state will not be immune where it waives it's immunity. The waiver must be express and can be effected in the following ways:

- In writing before the cause of action - for instance by inserting a clause in a contract of sale in which the state undertakes not to raise immunity in the case of problems arising from the contract;

- Expressly in writing after the dispute has arisen;

- Tacit waiver or waiver by implication, but a strong degree of proof of the intention of the state will be required;

- A waiver of immunity from trial does not include a waiver of immunity from enforcement of any judgment resulting from the court proceedings.

Commercial transactions.

Section 4 of the Foreign States Immunities Act provides that a commercial transaction is;

- any contract for **the supply of services or goods**;

- any loan or other transaction for the **provision of finance** and any **guarantee** or **indemnity** in respect of any such loan or other transaction or of

- any other financial obligation any other transaction or activity of a **commercial, industrial**, **financial, professional** or **other similar character** into which the foreign state enters or in which it engages otherwise than in the exercise of sovereign authority.

But does not include a contract of employment between a foreign state and an individual.

States remain immune as far as governmental public activities (acta jure imperii) are concerned, but are not immune when they perform commercial activities.
The American case Victory Transport Inc laid down certain acts which can be regarded as imperii:

- internal administrative acts;
- legislative acts;
- acts related to the armed forces;- acts related to diplomatic activity; - public loans.

Contracts of employment.

South African courts will exercise jurisdiction and the foreign state will not be immune where:

- the contract is **concluded** in South Africa, or;

- the work must **be complete**d entirely or in part in South African and;

- when **the contract was concluded**, the individual (including companies, etc) involved was a South African citizen or was resident in South African; and,

- when the action is instituted, the individual is **not a national of the foreign state.**

South African courts will not exercise jurisdiction and the foreign state will be immune where:

- the parties agree that their disputes will be heard by a foreign court; or,- the proceedings relate to the employment or activities of diplomatic, consular, administrative, technical or service personnel of a foreign mission.

EXAMINATION PAPER MAY -JUNE 2005.

QUESTION 1

(a) Discuss the approaches to treaty interpretation in international law and illustrate how these approaches are reflected in the Vienna Convention on the Law of Treaties. (15 marks.)

Answer:

Treaty interpretation is governed by articles 31, 32 and 33 of the Vienna Treaty Convention. There are basically three approaches to treaty interpretation.

Treaty interpretation is governed by articles 31, 32 and 33 of the Vienna Convention.

There are broadly three approaches to treaty interpretation:

- **The literal or textual approach** - concentrates on the actual text of the treaty

and reflects a positivist approach. This approach was used in the South West Africa, Second Phase Case.

- **The Purposive approach** - interprets the treaty to give effect to the purpose for which it was concluded. This approach was followed in South West Africa cases Article 31 of the V-C recognizes both the textual and teleological approaches by providing that treaties shall be interpreted in good faith in accordance with the ordinary meaning of the words used in context, bearing in mind the object and purpose of the treaty. These are the primary means of interpretation.

- **The intention of the parties approach** receives support from article 32, which permits recourse to 'supplementary means of interpretation, including the preparatory works of the treaty and the circumstances of it's conclusion'. Like municipal law, international law knows no hierarchy of rules of interpretation. Instead judges are allowed to select the approach which he considers most appropriate in the circumstances of the case.

Section 231(1) of the Republic of S-A Constitution reads:

"The negotiation and signing of all international agreements, is the responsibility of the national executive".

Although the Constitution does not define an "international agreement" this matter was settled in Harksen versus President of the R-S-A and finally in Jurgen Harksen versus President of the R-S-A.

(b), What do you understand under the term ius cogens. (5 marks.)

Answer:

Ius cogens is defined in the Vienna Treaty Convention as:

- an obligatory rule (of);
- general international law (which is);
- accepted and recognised by the community of states as a whole (as);
- a rule from which no deviation is allowed (and);
- which can be altered only by another norm or rule of the same kind.

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QUESTION 2.

"The creation of international law obligations for S-A by treaties is a function reserved exclusively for the executive. The legislature (parliament) can have no role in this area."

Evaluate this statement critically with reference to provisions governing treaty making in the Republic of S-A Constitution. (10 marks.)

Answer:

In essence a state's municipal law determines who may conclude treaties on behalf of the state. Therefore, to determine who may conclude treaties on behalf of South Africa the first source of reference will be our Constitution.

Section 231 (1) provides who may negotiate and sign treaties. In practice the President do not negotiate treaties and sign very few, this power is delegated to the Department of Foreign Affairs or a minister in charge of the topic covered by the treaty.

Section 231 (2) deals with the process by which a treaty becomes binding for South Africa on the international plane. The treaty must be approved by both houses of Parliament (National Assembly and the Council of Provinces).

Section 231 (3) provides that technical, administrative or executive treaties and treaties which require neither ratification nor accession, will bind South African on the international plane without approval by Parliament, but it must be tabled in the National Assembly and the National Council of Provinces within a reasonable time.

It is then clear from the above sections that a treaty will bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, except as provided for treaties falling under section 231(3).

S-A deposited an instrument of accession to the Kyoto Protocol to the United Nations Convention on Climate Change on the 31st July 2002. On the 15th February 2005 the Protocol entered into force. On the 28th February 2005 the South African Climate Change Action Network (SACCAN), a non-governmental organisation committed to promoting the reduction of carbon dioxide emissions in SA, approaches the Minister of the Environment and Tourism to discuss proposals for the reduction of carbon dioxide emissions in SA.

After considering the proposals, the minister writes a letter to the organisation in which he rejects the proposals as being 'economically not viable'. SACCAN approaches you for a legal opinion. Without discussion the merits of the case, write a legal opinion for SACCAN in which you set out the various ways in which SACCAN can use the Kyoto Protocol in a S-A court. In this legal opinion you must make a clear distinction between the direct use of the treaty, on the one hand, and the indirect (interpretative) use of the treaty on the other. (20 marks.)

Answer:

Section 231(4) provides that all treaties become law and are enforceable by municipal courts only once they have been "enacted as law by national legislation". However, there is one exception, in the case of a self-executing provision of an agreement that has been approved by Parliament. Such a provisions will become law in the Republic without the need for national legislation, provided that it is not inconsistent with the Constitution or an Act of Parliament.

The Kyoto Protocol is a treaty, it came into force on the 16th February 2005 and is therefore law in the Republic and must be enforced by municipal courts. The treaty is applied directly.

Section 232 provides that customary international law is law in the Republic, unless it **is inconsistent** with the Constitution or with an Act of Parliament. Evidence of state practice can be found in a variety of materials, including treaties.

The protection of the environment is guaranteed in Chapter 2 of the Constitution (section 24). Section 39 of the Constitution provides that when interpreting a Chapter 2 right:

- a court, tribunal or forum must promote the values that underlie an openand democratic society based on human dignity, equality and freedom;

- **must** consider **international law;**

- **may** consider **foreign law.**

Section 233 provides that when a court interprets legislations it must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

It must be noted that when the courts apply a treaty indirectly, it is not the treaty that is being applied, but rather another source of municipal law (international law).

QUESTION 3.

As part of a redistribution scheme aimed at redressing the wrongs of the past and redistributing SA's resources fairly, the government nationalises a profitable fishing company belonging to a Angolan national, Mr. Pisce. The company is handed over to members of the local fishing community, which has been fighting a long struggle against poverty and unemployment

However, section 25 of the 1996 Constitution determines in part.

No one may be deprived of property except in terms of a law of general application, and no law may permit arbitrary deprivation of property.

Property may be expropriated only in terms of a law of general application: - for a public purpose or in the public interest; and,

- subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all the relevant circumstances, including:

- the current use of the property;
- the history of the acquisition and use of the property;
- the market value of the property;
- the extent of direct state investment and subsidy in the acquisition andbeneficial capital improvements of the property; and, - the purpose of the expropriation.

Question:

Discuss the international law requirements for the nationalisation of alien property taking into consideration the effects of the United National Resolution on Permanent Sovereignty over Natural Resources (UN Resolution 1803 (17) and the 1974 Charter of Economic Rights and Duties of States (UN Resolution 3281 (19). (15 marks.)

Answer:

Nationalisation is not prohibited by international law. There are, however, certain basic requirements that must be met before alien property may be nationalised:

- The nationalisation must not be discriminatory;- The nationalisation must be for public purposes; - Compensation must be paid.

In terms of (1) a state cannot nationalise only the property of Angolese nationals in its territory, while leaving intact equivalent property belonging to German nationals. This will be discriminatory. Public purposes mean that the nationalisation must be for the good of the country as a whole - it must be part of a "grand scheme" for the upliftment of the nation.

UN Resolution 1803 requires appropriate compensation in accordance with municipal and international law.

UN Resolution 3281 requires appropriate compensation in terms of municipal law and taking into account all pertinent circumstances.

Question.

Using section 25, critically evaluate whether the S-A government's nationalisation of Mr. Pisce's company complies with the international law requirements set. (10 marks.)

Answer:

Regarding section 25(1) it is not clear from the facts whether the fishing company of Mr. Pisce was the only local one that could have been nationalised by the government. If there also had been a fishing company belonging to a German national, the picture could change.

If from the facts Mr. Pisce was singled out, **the nationalisation will be discriminatory.** Regarding public purpose, the nationalisation must benefit the nation as a whole or at least large sections of the population.

By handing over the fishing company to the local fishing community who has been fighting a long struggle against poverty and unemployment, appears to be a "public purpose".

Section 25(2)(2) provides that the nationalisation is subject to compensation being paid. The facts are quiet about compensation. UN Resolution 1803 requires appropriate compensation in accordance with municipal and international law. UN Resolution 3281 requires appropriate compensation in terms of municipal law and taking into account all pertinent circumstances.

This is where section 25(3) comes into play.

If, therefore, Mr. Pisce was not singled out and was paid compensation which was just and equitable the nationalisation will comply with the international law requirements.

QUESTION 4.

With reference to recent international and municipal case law and other legal developments (resolutions) discuss critically the extent to which international law developments regarding: Head of state immunity; Government officials other than head of state; and, Immunity of the United Nations (UN), specialised agencies and other international organisations are reflected in the S-A Diplomatic Privileges and Immunities Act. (25 marks.)

Answer:

Head of states.

Section 4(1) of the Diplomatic Privileges and Immunities Act provides that a head of state is immune from the criminal and civil jurisdiction of the court of the Republic, and enjoys such privileges as Heads of state enjoy in accordance with the rules of customary international law are provided for in the agreement entered into with a state or government where immunities and privileges are conferred upon such a head of state may be conferred on such a head of state by virtue of section 7(2).

In the **Pinochet case** the court found that a serving head of state was entitled to absolute immunity, but that a former head of state was entitled to immunity only for acts performed in the "exercise of his functions as head of state"

In the **Ghaddafi case**, it was claimed that the Libyan government was involved in the bombing of a U-T-A aircraft which caused the death of the passengers and crew members. A complaint was filed against Ghaddaffi, the Libyan leader. The court however, accepted the plea of immunity and declined jurisdiction.

There is however, growing international pressure for heads of state to be liable for their actions. A head of state remains subject to private law that protects creditors and other individuals. A head of state also has no immunity regarding the misappropriation of his own state's assets.

Government officials other than heads of state.

In terms of section 4(2) of DIPA a special envoy or representative from another state, government or organisation is immune from the criminal and civil jurisdiction of the courts of the Republic, and enjoys such privileges as:

- **a special envoy**, or representative enjoys in accordance with the rules of customary international law;

- **are provided for in any agreement entered into with a state**, government; or,

- **organisation whereby immunities and privileges are conferred upon such special envoy or representative**; or,

- **may be conferred on him by virtue of section** 7(2).

The Minister of Foreign Affairs must by notice in the Government Gazette recognise a special envoy or representative. In the Yerodia case the court found that a Minister of Foreign Affairs enjoys the same absolute immunity as heads of state.

However, ad hoc judge Christine van den Wyngaert pointed out that the court's evenhanded approach to heads of state and ministers of foreign affairs, has no basis in international law. In fact, quite the opposite holds true since this goes against recent developments in the area of accountability for international crimes and international criminal law on the whole.

3. Immunity of the United Nations, specialised agencies and other international organisations.

Section 5 of the DIPA provides that the Convention on the Privileges and Immunities of the United Nations applies to the United Nations and **it's officials in the Republic and that the Convention of the Privileges and Immunities of the Specialised Agencies, applies to any specialised agency and it's officials in South Africa**.
Cumaraswamy was the special reporter for the Human Rights Commission in Malaysia.

In an interview he expressed certain opinions on the independence of the country's judges and courts. As a result of this he was sued for defamation in a Malaysian court. The International Court of Justice found that, in terms of the Convention on the Privileges and Immunities of the United Nations, he was entitled to "immunity from legal process of every kind for the words spoken by him during the interview".

QUESTION

It is 2020 in South Africa. The new African Alliance Party for Change (NAAPC) is in power. The party decides to implement a new policy aimed at "speedy redistribution of land". The government subsequently enacts the Land Redistribution Act 68 of 2020. In terms of the Act the Minister of Land Affairs may expropriate land for public purpose or in the public interest which, under the definition section, includes redistribution. Further, under the Act, the Minister may decide the amount payable for compensation. Mr. IN Fringed, a farmer in the Orange Free State whose farm has been expropriated with no compensation, claims that the action of the Minister violates his constitutional rights. Using section 39 of the Constitution fully discuss the merits of Mr. Fringed's claims (25)

It is 2020 in South Africa and the question relates to section 39 of the Constitution, we can therefore safely presume that the 1996 Constitution is still relevant.

It is not clear from the facts of the question whether Mr. IN Fringed is a national of South Africa. Mr. IN Fringed claims that the action of the Minister of Land Affairs violates his constitutional rights. If Mr. IN Fringed is a South African national, his remedy will lie in South African law.

Firstly, we will have to establish whether a human right has been infringed. In order to do this, we have to consult Chapter 2 of the Constitution. Section 25(2) of the Constitution provides that property may be expropriated, subject to compensation being paid and section 25(3) provides that the amount of compensation must be just and equitable, having regard to all relevant circumstances.

We have now established that a Chapter 2 right has been violated, and where a Chapter 2 rights has been violated, the Constitution provide that section 39 governs the interpretation of the right.

Section 39 provides as follows:

(1), When interpreting the Bill of Right, a court, tribunal or forum:

- **must promote the values that underlie an open and democratic society based on human dignity, equality and freedom**;

- **must** consider **international law**; and,

- **may** consider **foreign law.**

Section 39 therefore order the court to consider international law although it does not have to apply international law. But where do we find International Human Rights law? In order to consider international law we have to look at the sources of International Human Rights Law, these are:

- **International documents (treaties).**

Firstly, we have to look at the actual texts of the international documents in order to establish whether there is a right which corresponds to the Chapter 2 right which have been infringed. In this instance the court must be presented with recommendations of commissions and decisions of courts established under the international documents.

- **Foreign law.**

Secondly, it is necessary to consider the decisions of foreign courts in order to establish how they have dealt with a similar violation.

- **Customary International Human Rights Law.**

Thirdly, it must be established whether the right that has been violated complies with the international requirements for the formation of custom (usus and opinio iuris).

For instance, if it can be proved that it is a general practice among states that compensation is paid when property is expropriated and, by not doing so, it would be committing an international "wrong", it will constitute a customary rule which will bind state. In terms of section 232 Customary International Law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

- **Soft law.**

Lastly, we have to look at those sources which do not traditionally give rise to enforceable law as such, for instance, non-binding General Assembly resolutions; the opinions of writers and commentators on human rights.

If Mr. IN Fringed is a foreigner, the violation will be a matter of international law. South Africa will incur responsibility because of it's failure to treat the foreign national according to the minimum standards of justice required for the treatment of aliens.

The basis for responsibility in this case is that South Africa has injured the plaintiff state by injuring it's national. In order for the plaintiff state to succeed with a claim against South Africa, it will have to prove:

- That the **injured person was it's national;**
- All **local remedies have been exhausted**;
- The conduct of South Africa **violates the rule of international law** relating to the treatment of aliens.

Expropriation of land is not prohibited by international law.

There are, however, certain basic requirements for a nationalisation to be valid in terms of Public International Law, these are:

- The nationalisation must **not be discriminatory**; - The nationalisation must **be for public purposes**; - **Compensation must be paid**.

Section 39 provides that a court must consider international law and we therefore have to consult international law regarding the payment of compensation. In this regard we will turn to the United Nations Resolution 1803 which requires appropriate compensation in accordance with municipal and international law, and the United Nations Resolution 3281 which requires appropriate compensation in terms of the municipal law and taking into account all pertinent circumstances.

Section 25 of the Constitution incorporates public purpose, public interest and compensation in it's requirements for expropriation. The expropriation must also be in terms of general application which takes care of the non-discrimination requirement of International law. Section 25(3) prescribes a number of factors which have to be considered

in calculating the amount of compensation. Compared to the "benefits theory" these factors show great similarity to the way Resolution 3281 is interpreted.

The Constitution is the highest law in the land and any legislation which is not in line with the Constitution can therefore be declared unconstitutional. The fact that the Minister may decide the amount payable for compensation is not in line with section 25(3) of the Constitution, as this section provides for certain circumstances to be taken into consideration.

The fact that Mr. Infringed were not compensated for the expropriation of his farm violates his constitutional right and his right under international law.

Tutorial Letter 2009.

Question 1:

1(b), Explain whether the rule nemo iudex in sua causa applies in international adjudication. Substantiate your answer. (5 marks.)

Answer:

Nemo iudex in sua causa means that nobody may be a judge in his or her own case. In national law this means that a judge must be unbiased and impartial, and nobody may "choose" a judge who is sympathetic to his or her case. This principle does not apply in international adjudication. For example, in terms of article 31 of the I-C-J statute, judges of the nationality of each of the parties retain their right to sit in the case before the Court, and should one of the parties not have a representative judge on the bench, it may to choose an ad hoc judge for the specific proceedings. There are abundant examples of this situation in I-C-J jurisprudence, for example the South West
Africa Cases (Justice Van Wyk chosen by S-A), and Case Concerning Ahmadou Sadio Diallo (Republic of Guinea versus Democratic Republic of the Congo) Preliminary Objections (Mohammed Bedjaoui – later Ahmed Mahiou chosen by Guinea and Auguste Mampuya Kanunk'a - Tshiabo chosen by the D-R-C).

1(c), The state of Medonesia is a developing state. Its government is to a large extent subservient to that of the state of Powerasia, on which it depends for economic aid. The Gangasta Rebels are a well-organised militant group, operating within Medonesia, who have been planning a coup against the Medonesian government for years. The coup is successful, and in February 2009 the Gangasta Rebels proclaim themselves the governing authority of Medonesia. The Gangasta Government harbours very strong anti-Powerasia sentiments and relations between the two states become hostile. In the meantime, counter-insurgents within Medonesia start organising themselves for a strike against the Gangasta government. Powerasia secretly promotes the anti-Gangasta civil dissidents, by supplying them with weapons and training. Analyse this situation and write a legal opinion explaining whether Powerasia has violated any rules of international law, and if so, what Medonesia's remedies would be. (15 marks.)

Answer:

Powerasia's actions may be considered a violation of article 2(4) of the UN Charter, which obliges member states to refrain in their international relations from the threat or use of force against the territorial integrity or political independence of other states. A state may not interfere in the civil strife of another state, must refrain from organising or encouraging the organisation of irregular forces or armed bands to invade the territory of another state, or from instigating, or assisting terrorist acts in another state, or from forcible actions which deprive peoples from their right to self-determination as established by the 1970 Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States.

Medonesia could sever all its diplomatic relations with Powerasia, for example by **expelling Powerasia's diplomats from its territory and recalling its own diplomats**. Medonesia could also resort to **retortion.**

Retortion is a valid and lawful act, and its aim would be to stop Powerasia's unlawful action. An example would be the banning of exports from Medonesia to Powerasia. Medonesia could also resort to a reprisal, which does not involve the use of armed force (countermeasure). The action of reprisal is prima facie unlawful, but because Medonesia would be retaliating against Powerasia's illegal action, its act of reprisal would be permissible if it is:

- **in response to a prior illegal act;**
- **carried out with a view to restoring equilibrium in international relations**;
- **proportionate to the injury sustained**; and,
- **used as a last resort** (Medonesia must have first attempted rectification).

Reprisals which involve the use of force are prohibited by article 2(4) of the UN Charter, but they may be tolerated and de facto acceptable, provided they fall within the ambit of "reasonable reprisals".

Medonesia could also impose an embargo on Powerasia, or resort to a boycott, or it could (together with its allies) impose economic sanctions on Powerasia.

However, considering the fact that Medonesia is economically the weaker state, it is unlikely that any such actions will be possible, or sensible, in the circumstances.

Medonesia could bring the situation to the attention of the Security Council.

Under Chapter 6 of the UN Charter the Security Council may address disputes which do not yet threaten international peace and security but which are likely to do so if they remain unresolved. In terms of article 36(1) the S-C may recommend appropriate measures or procedures in order to remedy the situation, and in terms of article 37 it may make settlement proposals.

If, however, the S-C has determined that the situation amounts to a threat to

the peace, a breach of the peace, and an act of aggression, it may take a decision binding on the members states which direct them to act in order to stop the violation and restore and maintain international peace and security.

These decisions are taken under Chapter 7 of the UN Charter. Article 41 provides for the introduction of peaceful measures (eg, severance of economic and diplomatic relations with Powerasia).

If such peaceful measures fail, and as a last resort, the S-C would be empowered to take action by means of air, sea, or land forces against Powerasia. In practice it would mean that the S-C authorises member states to use force against Powerasia.

Most importantly, however, one must bear in mind that international legal disputes should as a general rule be referred by the parties to the International Court of Justice.

In terms of article 33(1) of the UN Charter (Chapter 6) the parties to a dispute (in this case Medonesia and Powerasia) which, if continued, is likely to endanger international peace and security, must seek a solution by (amongst others) the following measures: **- meaningful negotiations**

- arbitration, **which can be defined as "[the] procedure for the settlement of disputes between states by a binding award on the basis of law and as a result of an undertaking voluntarily accepted**";

- judicial settlement, where the case may be referred to the I-C-J foradjudication

Powerasia and Medonesia may submit their dispute to the I-C-J once they have reached a special agreement (compromise) to that effect. The court could also exercise jurisdiction on the basis of forum prorogatum (implied consent), or by virtue of the mechanism provided for by article 36(2) of the I-C-J statute (the compulsory jurisdiction "optional clause").

Question 2 (Total: 25 marks).

Answer the following questions on jurisdiction in international law:

2 a(i), Miss Aim stands on the banks of the Orange River in Namibia and fires a warning shot at a poacher in Namibia. The shot goes awry and hits Ms BD Luck, who is standing on the opposite bank of the river in South Africa watching the events. Explain clearly whether Namibia and or South Africa will have jurisdiction, and on what bases. (4 marks.)

Answer:

Namibia - **subjective territoriality** - the act commenced on its territory and was completed on the territory of another state (S-A).

S-A - **objective territoriality** - the act commenced on the territory of a foreign state (Namibia) and was completed on S-A territory.

2a(ii), Ms PS Port leaves her home country, X, on holiday, and while visiting country Y, murders a fellow citizen of X in Y's territory. Explain whether X can exercise jurisdiction over Ms PS Port, and if so, on what basis. (2 marks.)

Answer:

Yes, X can exercise jurisdiction on the basis of nationality - a state may exercise jurisdiction over the acts of its nationals, wherever they may have acted. X can also exercise jurisdiction on the basis of passive personality, since the victim was a citizen of X..

2a(iii), Mr T Reason, a British citizen living in England, plots to bring down the government of South Africa by introducing a new strain of cholera into the country's drinking water. Explain whether South Africa may exercise jurisdiction over Mr T Reason and if so, on what basis. (2 marks.)

Answer:
South Africa may exercise jurisdiction on the basis of state protection, because the foreigner has performed an act which endangers the safety of the state.

2(a)(iv), Mr D Evil, an acknowledged war criminal, is hunted down by outside agents and found in the peace-loving country, Idyll. Explain whether a third party state, not connected to Mr D Evil in any way could exercise jurisdiction over Mr D Evil, and if so, on what basis.

Answer:

Yes, a third party state may do so, because Mr D Evil has committed an international crime which threatens the interests of the international community as a whole, and any state may claim jurisdiction on the basis of universality.

2(b), John Dugard International law: a South African perspective (3rd edition)states:

"The extent to which recommendations of the political organs of the United Nations play a part in the formation of custom is a matter of much debate." Discuss fully, with reference to the requirements of custom and case law, whether United Nations resolutions can give rise to binding customary international law. (10 marks.)

Answer:

Customary international law rules must meet two requirements:

usus
and
opinio
iuris.

A G-A resolution is adopted by a vote, which expresses the acceptance of the principle by those states voting in favour. These votes demonstrate the states' support for this principle. In S versus Petane, Justice Conradie stated that resolutions of the G-A may constitute opinio juris, which, if coupled to state practice, could create a rule of customary international law.

However, he cautioned that if there was no preceding usus, the resolution itself could not create custom.

He did mention that one could treat the resolution itself as usus and opinio iuris at the same time, but was quick to point out that that would stretch the definition of usus far too wide, since usus ought to be evidenced by material, concrete and specific acts by states. In his words:

"United Nations Resolutions cannot be said to be evidence of state practice if they relate not to what the resolving states take it upon themselves to do, but what they prescribe for others." He also cast doubt on the creation of customary rules on the basis of certain provisions of the universal Declaration of Human Rights. The reason for this was that even though states had supported the declaration and adopted many of its provisions in their national laws, state practice did not follow the principles of the Declaration.

A different approach can be seen in the US judgment in Filartiga versus Pena Irala on the question of the prohibition of state torture. Relying on the universal Declaration and other resolutions, and without investigating the uestion of usus in great detail, the court stated that the prohibition had become part of customary international law. A similar stance was taken in the Nicaragua case. The court discussed the prohibition on the use of force and concluded, relying on the presence of opinio juris alone, that the latter was part of customary international law.

As Dugard points out, the court's reasoning "does suggest that a customary rule may be established with little evidence of settled practice where the opinio juris on the part of states is clear from their support for resolutions of the General Assembly". In the Legality of the Threat or Use of Nuclear Weapons the court noted that G-A resolutions may "provide evidence important for establishing the existence of a rule or the emergence of an opinio juris" in certain circumstances. The court noted that one also needs to look at the manner in which such resolutions were adopted. For example, a resolution adopted with a number of negative votes and abstentions will fail to establish the existence of an opinio juris.

2(c), Compare the acquisition of international legal personality by a state and by an international organisation. [5 marks.]

Answer:

An entity becomes a state (and acquires international legal personality) if it meets the requirements mentioned in the Montevideo Convention of 1933:

- permanent population,
- defined territory,
- effective government, - foreign affairs capacity.

In addition, if the constitutive theory to recognition is followed, then an entity must also have been recognised as a state by other states. A state is an original (primary) subject.

An organisation, on the other hand is a derivative (secondary) international law subject. It is created by a treaty between primary subjects of international law (states), and has only such powers and duties as have been conferred upon it by its founding members.

3(b), South Africa and Switzerland conclude a treaty through the exchange of notes. In terms of the treaty Switzerland agrees to make 10 million Euros available to the South African Department of Health for the purchase of antiretroviral drugs to be used in the fight against Aids in rural communities. In terms of this treaty, the Swiss Ministry of Health will transfer funds to the South African Department of Health on receipt of a substantiated request from the S-A Minister of Health in which specific rural clinics needing antiretrovirals are identified. The S-A Minister identifies the Helen Suzman Clinic in rural Natal as such a clinic.

Using this as a practical example, discuss fully the operation and effect of the treaties in terms of sections 231(2), (3) and (4) of the Constitution. (15 marks.)

Answer:

Firstly, it needs to be established how the treaty would become binding on S-A in the international sphere.

Section 231(2) provides that "an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)". The exceptions to this section, listed in section 231(3), are agreements of a technical, administrative or executive nature, or agreements which do not require either ratification or accession, entered into by the national executive. They bind the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within reasonable time.

It therefore has to be established whether the treaties in this set of facts would fall under subsection (2) or (3). The first category of section 231(3) treaties, namely those of "**technical", "administrative" or "executive" nature are difficult to define**. Under this category one will mostly find agreements of a routine nature concerning the day to day activities of government departments, and which carry no financial implications for the country.

Notably it is the department itself, in consultation with the Department of Foreign Affairs, which decides what amounts to day to day activities. Therefore, in case of doubt, the longer parliamentary route of approval by resolution in the N-A and the NC-o-P should be followed as specified in section 231 (2).

The second category concerns treaties not requiring ratification or accession. Sometimes the provisions of the treaty itself will state whether it falls under that category. If the treaty is silent, it will be the intention of the parties which will determine whether the treaty requires ratification or not.

Most treaties would fall into this category and they will come into force internationally on signature alone. In this instance we have a bilateral assistance treaty, and we could assume that the provisions of section 231(3) would apply. Furthermore, each request and consent for the transfer of funds upon the identification of the relevant clinics would amount to a treaty, but since these "mini agreements" are routine, concerning administrative matters, and have no budgetary implications for the country, they would be subject to the procedure of being tabled before Parliament without having to be approved by Parliament.

Section 231(4) provides that all treaties become law in the Republic when enacted as law by national legislation, **excepting self-executing provisions of an agreement which has been approved by Parliament**. The latter is law in the Republic unless it is inconsistent with the Constitution or an act of Parliament.

In this instance, for the treaty to apply municipally, it has to be transformed by way of legislation. "National legislation" includes an act of Parliament, subordinate legislation made in terms of an act of Parliament, as well as legislation which was in force when the Constitution took effect and which is administered by an act of Parliament. There are three principal methods which are employed by the legislature in order to translate treaties into municipal law:

- **The provisions of a treaty may be included in the wording of an act of Parliament.**

- **The treaty may be included as a schedule to an act of Parliament.**

- **The Executive may bring the treaty into effect in municipal law by proclamation in the Government Gazette**, provided the Executive is given the power to do so by an enabling act of Parliament.

It must be noted that mere publication in the Government Gazette for general information does not amount to an act of transformation.

Section 231(4) applies to all agreements including those which would (for purposes of determining how they would bind the Republic internationally) be categorised as section 231(3) treaties. We have determined that the treaty or treaties would fall under the provisions of section 231(3). They must therefore be transformed by way of legislation. Furthermore, the question whether they can be selfexecuting does not arise because, as we have explained above, these treaties were merely tabled before Parliament and have not been approved by it. They can thus not be self-executing and must be incorporated by way of legislation.

SECTION C..

Runaway inflation, the collapse of the medical and sanitary infrastructures leading to the uncontrolled spread of the deadly cholera epidemic which has claimed over 2000 lives, widespread hunger and lack of even the most basic resources, detention and torture of dissidents, a "government" which disregards the rulings of the courts, etcetera, have led certain commentators to say that Zimbabwe is a failed state which can no longer meet its obligations as a member of the international community.Using both the traditional and emerging requirements for statehood as the basis for your answer, analyse the current situation in Zimbabwe, and assess whether it would qualify as a state were the question to arise in 2009. [25 marks.]

Answer:

Before an entity can qualify as a state, it must meet all the requirements for statehood. The Montevideo Convention of 1933 provides the following definition: "The state as a person of international law should possess the following qualifications:

(a) a **permanent population**;
(b) a **defined territory**;
(c) **government;**
(d) **capacity** to enter into relations with other states."

Permanent population.

The "permanent population'' requirement does not mean that there is a required minimum number of people. Furthermore, the fact that a population is nomadic (eg the tribes on the Kenya-Ethiopia border) does not affect statehood adversely, as was pointed out by the court in the Western Sahara Case. What is important for the purpose of the "permanent population" requirement is that the population lives in accordance with an organised, recognisable social and political structure with a clear chain of command. Defined territory.

This is a requirement which flows from the fact that states are territorial units, in other words they have borders. It is important for a state's territory to be defined. There is no required minimum size. This requirement does not imply that the territory must have undisputed borders. Israel serves as an example:

- despite the ongoing territorial dispute with Palestine, Israel still satisfies the requirements for statehood.

Furthermore, the territory need not necessarily form one single unit.

What is important is that the state must be sufficiently homogenous to be able to perform its function of government effectively. In other words, there must be a stable community within an area over which its government has control.

Effective government.

In order to satisfy the requirements of statehood, the entity must have a government which is independent of any other authority, and it must have legislative and administrative competencies.

Brownlie suggests some guidelines which can be used to assess a government's effectiveness.

- Does it have its **own executive organs**?
- Does it **conduct relations** through these organs?
- Does it have an **independent legal system**?
- Does it have its **own courts**?
- Does it have its **own nationality**?

The situation in Zimbabwe may lead one to believe that the state is a failed state lacking an effective central government, and thus no longer meeting this requirement of statehood. However, although the theoretical possibility exists for states to withdraw their recognition of the entity as a state (the two theories of recognition should also be discussed at some point in the answer), such a move would be unprecedented in international law, and impractical.

Dugard suggests a solution - **the creation of trusteeship** - but also acknowledges that such a solution is unlikely to be followed because of the concomitant colonial innuendos.

Capacity to enter into relations with others states (foreign affairs capacity).

This requirement means that a state must be independent of any other authority in the exercise of its foreign relations. In other words, the entity must be regarded as sovereign. However, the fact that a state has relinquished certain aspects of its sovereignty will not necessarily deprive it of statehood (R versus Christian). What is important for the establishment of statehood and the accompanying international legal personality is the presence of external sovereignty.

Furthermore, it must be pointed out that this requirement is also closely linked to the issue of recognition - if the other members of the international community refuse to recognise a state and enter into relations with it, that state will for all practical purposes be deprived of its capacity to enter into relations with other states.

There are two further controversial requirements, namely respect for human rights, and self-determination, that have been cited as requirements on occasion. For example, when the U-S-S-R was dissolved, Western states proclaimed that recognition of the emerging states would be subject to their willingness and ability to uphold the human rights of their subjects.
Zimbabwe could be seen to be falling short on this requirement.

The requirement of recognition (which is potentially problematic in this instance) is not specifically mentioned in the Montevideo Convention.

However, in practice it is a crucial factor which underlies the ability of a state to enter into relations with other states.

The question whether recognition is one of the requirements for statehood has given rise to two theories: the declaratory theory and the constitutive theory.

Proponents of the constitutive theory maintain that the act of recognition is one of the requirements for the creation of international legal personality. The proponents of the declaratory theory on the other hand advocate that the act of recognition is not a requirement for statehood, and that such an act merely acknowledges an existing state of affairs.

These two theories have been evaluated by a South African court in the case of **S versus Banda**. The court had to decide whether **Bophuthatswana qualified** as a state under international law or not, a decision that would have been relevant to the accused's charge of treason. The court considered both theories and came to the conclusion that the declaratory theory was the more acceptable one, for the following reasons:

- **it was objective**; and,
- it **took into account only those four requirements** which are based on wellestablished rules of international law.

The court criticised the constitutive theory on the grounds that it was arbitrarily applied and based on politics. It was found to make allowance for political, ideological and economic motives behind the act of recognition. Because so many variables could come into play, as well as the fact that it was so subjective, the theory was considered unsuitable for determining the existence of a legal entity.

The point remains, however, that one cannot completely ignore the need for recognition. After all, the capacity of a new entity to enter into foreign relations (or at least to demonstrate such a capacity in practice) depends on recognition of the entity by others.

As pointed out, however, it is unlikely that Zimbabwe's recognition by other states would be withdrawn. The only solution would therefore be what Dugard terms "informal state building" by the international community. In this manner Zimbabwe could possibly be enabled to become an entity capable of meeting its international obligations, as required by, inter alia, article 4 of the UN Charter.

Assignment 02 - Semester 1 - 2011.

Indicate whether the following statements are true or false:

1. **A bilateral treaty concluded as a result of a fraudulent action of the other negotiating state results in a voidable treaty, which is valid and operative, but the defrauded state is given the option to terminate it** - False.

2. **Soft law is never binding on states** - True.

3. **When a person violates the rights of a foreigner, the foreigner's state of nationality may claim jurisdiction to prosecute the perpetrator on the basis of nationality** - False.

4. **The Security Council may take decisions binding on member states under Chapter 6 of the UN Charter** - False.

5. **In terms of section 39(1)(b) of the South African Constitution, only binding international law must be considered when a court, tribunal or forum interprets a provision in the Bill of Rights** - False.

6. **In Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) (1970) 1971 (I-C-J Rep) the court followed a textual approach to treaty interpretation**. False.

7. **The principle that a state may exercise jurisdiction in its own territory over acts which have occurred on the territory of another state was laid down by the Permanent Court of International Justice in the Lotus case 1927**
- True.

8. **No state may deviate from a rule of jus cogens, unless it is a state which has objected persistently to the formation of such a rule** - False.

9. **In South African law, the term "international agreement", as used in section 231 of the South African Constitution of 1996 is synonymous with the term "treaty", as defined in article 2(1) of the Vienna Convention on the Law of Treaties, and includes informal agreements** - False.

10. **The Vienna Convention on Succession of States in Respect of Treaties of 1978 espouses the "clean-slate" theory of state succession** - True.

11. **In S versus Banda (1989) the court discussed the constitutive and declaratory theories of recognition and concluded that the declaratory theory was preferable because it was the more objective of the two theories**
- True.

12. **A state may exercise universal jurisdiction provided it can show that its own safety has been endangered** - False.

13. **The Rome Statute allows the International Criminal Court of 1998 to exercise jurisdiction over genocide, crimes against humanity, international treaty crimes and war crimes** - False.

14. **Soft law features as a source of international law in article 38 of the Statute of the International Court of Justice** - True.

15. "**Hot pursuit" is always illegal in international law** - False.

Tutorial Letter 203-2009.

Answer to Assignment 02.

The United States of Ants (whose Head of State is President J Oak) and the Republic of Oilandia (with President D-E Spot as its Head of State) are bitter rivals. President J Oak issues the following statement in his address to the United Nations General Assembly:

"The first time we may be completely certain D-E Spot has a nuclear weapon is when, God forbid, he uses one. We owe it to all our citizens to do everything in our power to prevent that day from coming."

Six months later USA troops occupy Oilandia. Explain whether their actions can be justified in the context of article 51 of the UN Charter.

Answer:

In order to answer this question you had to analyse article 51 of the UN Charter and the concept of anticipatory self-defence.
:
The accepted approach in international law and in terms of the United Nations Charter regarding international peace and security is set out in article 2(4) of the United Nations Charter:

- All members shall refrain in their relations from the threat or use of force against the territorial integrity or political independence of any state, or any other manner inconsistent with the purposes of the United Nations.

However, Article 51 of the United Nations Charter allows for self-defence under certain conditions:

- Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, **until the**

Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

Article 51 makes it clear that the act of self-defence must be reported to the Security Council (S-C). Self-defence falls away once the S-C acts. The purpose of the use of force is to defend oneself. In addition the force exercised in self-defence must be proportionate to the posed threat.

However, article 51 poses a problem. It is not clear from its formulation whether it only allows for self-defence after an armed attack, or whether anticipatory selfdefence is permissible.

On the other hand the right to self-defence did not arise from nothing in the 1945 United Nations Charter. This right existed long before 1945, and its customary-law elements were somewhat wider in scope. Dugard (p 506) mentions that pre-Charter self-defence had to be an immediate and necessary response to a situation threatening a state's security and vital interests.

Self-defence had to be proportional to the attack. Most importantly the right to self-defence included both anticipatory self-defence and intervention to protect nationals.

Today there is disagreement about the concept of self-defence. Dugard (p 507) points out that there are some people who argue that article 51 is complete as it is, while others see the phrase "inherent right" in article 51 as proof that the customary international law approach to self-defence continues. The International Court of Justice in the Nicaragua case supported the customary nature of the "inherent right", and this was supported in the Legality of the Threat or Use of Nuclear Weapons case.

There is also disagreement about anticipatory self-defence. There are those who argue that article 51 only permits self-defence if an armed attack occurs. Those opposed to this idea say that anticipatory self-defence as accepted in customary international law is part and parcel of the "inherent right" in article

In the given set of facts there is no evidence of an attack on the United States of Ants. There is also uncertainty whether Oilandia has nuclear weapons. We are therefore dealing with anticipatory self-defence, and the arguments raised above apply. You have seen that there are two schools of thought. You need to decide, based on the arguments, whether you think that the actions of the SA troops can be justified, and provide support for your view point.

Remember too that times have changed and so has the nature of modern weaponry. Dugard says that "...in the context of modern weaponry it is ridiculous to argue that the drafters of the Charter could have intended to exclude such right" (p 507).

STATE SUCCESSION TO TREATIES:

Succession: is the replacement by one state of another in the responsibility of the internal relations of the territory

3 theories:

1. Clean slate: the state isn't bound by the rights and duties of its predecessor = problem: vacuum

2. Full succession: accept all the rights and duties of the predecessor (impractical)

3. Provisional succession: the new state succeeds to the rights and duties of the predecessor for a certain period and then decides which of the commitments it will or won't accept. Advantage: avoids the vacuum

ENFORCEMENT OF PIL:

Enforcement involving self-help:

1. **Retortion**: where one state violates PIL and another state acts to stop the violation

2. **Reprisal:** A acts unlawfully and B retaliates with prima facie unlawful action = B's action is made lawful by A's unlawful act = REQUIRMENTS

a. Must be in response to a prior illegal act
b. Restore the equilibrium in international relations
c. Proportionate
d. Last resort

3. **Embargo:** it's a unilateral ban on the import and export = can be politically based

4. **Sanctions**: joint action by a group of states/IO

5. **Boycott**: unilateral action, which is wider than an embargo = can be politically based

6. **Hot pursuit**: where a state violates PIL at sea, bring them to municipal court on land

7. **Diplomatic action**: 1st resort – the state acted against doesn't need to violate PIL

-Recall their diplomats
-Expel the offending states diplomats
-Terminate diplomatic relations

A41: SC may decide on measures such as interruption of economic relations, sever of diplomatic relations and call on UN members to apply these measures

8. **Self defence**: UN Charter A2 (3 and 4): requires states to settle disputes peacefully and prohibits the use of force

-A51: allows for self defence when there is an armed attack BUT it must be reported to the security council
-The action is only valid until the security council acts = purpose: state has a right to defend themselves The measures used by the defending state must be proportionate to the attack

-A42: if the peaceful measures resorted to in A41 fail = SC can take action by air, sea or land forces. This is a LAST RESORT and must be necessary for the restoration or maintenance of peace and security
-No military force is available to the SC = an action under A42 = authorization by the SC of the use of force by the member state

Assignment 1 Semester 1 2012

Suppose that in 2007 South Africa, Zimbabwe, the DRC and Mozambique conclude an agreement governing the treatment of each other's nationals. The agreement places particular emphasis on the protection of these immigrants' human rights. After the wave of xenophobic attacks in 2008, three DRC nationals find themselves in a refugee camp, alongside other survivors of the attacks. However, they claim to have suffered physical and emotional abuse by officers of the SAPS. They wish to bring an action against the South African Minister of Safety and Security in a South African court.

Advise them whether, and under what circumstances and subject to what requirements, they would be able to bring an action relying on the provisions and status in South African law of the abovementioned international agreement. (25)

The applicants can rely directly on this international agreement if:

its provisions have been incorporated into municipal legislation as stipulated in section 231(4) of the Constitution. This section provides that any international agreement becomes law in the Republic when it is enacted as law by national legislation, **unless**

> the provision relied upon is a self-executing provision of an agreement that has been approved by Parliament. Such an agreement becomes law in the Republic without an enactment, **but** it must not be inconsistent with the Constitution or an Act of Parliament.
>
> "National legislation" includes an Act of Parliament, subordinate legislation made in terms of an Act of Parliament, as well as legislation which was in force when the Constitution took effect and which is administered by an Act of Parliament. There are three principal methods which are employed by the legislature in order to translate treaties into municipal law:

Firstly, the provisions of a treaty may be included in the wording of an Act of Parliament. The treaty may also be included as a Schedule to an Act of Parliament.

Alternatively, the Executive may bring the treaty into effect in municipal law by proclamation in the *Government Gazette*, provided the Executive is given the power to do so by an enabling Act of Parliament. It must be noted that mere publication in the *Government Gazette* for general information does not amount to an act of transformation.

Another important question is what is meant by "self-executing" provisions. In a Nutshell, a treaty is self-executing if it does not expressly or by its nature require legislation to make it operative municipally. It creates rights and duties directly and should be clearly worded with respect to the rules in terms of which such rights and duties may be implemented. The agreement or treaty should therefore contain adequate provisions to enable South Africa to carry out its international obligations.

It would not be considered self-executing if it merely lays down general principles. Whether implementing legislation is required can only be determined with reference to the actual provisions of the treaty, the intention of the parties and the surrounding circumstances.

(5) **The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect**.

Section 232

Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

SECTION 233

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

SECTION 39(1)(b)

When interpreting the Bill of Rights, every court, tribunal or forum must consider international law.

SECTION 39(2)

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.